Aggregation in Criminal Law

Brandon L. Garrett†

TABLE OF CONTENTS

† Associate Professor, University of Virginia School of Law. I give special thanks to Kerry Abrams, George Rutherglen, Susan Sturm, and Larry Walker for their invaluable comments on several drafts. I also gratefully acknowledge very helpful comments from Rachel Barkow, Richard Bonnie, Marc Falkoff, Samuel Gross, John C. Jeffries, Jr., James Liebman, Henry Monaghan, John Monahan, Richard Schragger, Christopher Sprigman, The Honorable Jack B. Weinstein, Ann Woolhandler, participants at the University of Virginia Law School Annual Faculty Retreat, the Columbia Experimentalism Group, and excellent research assistance from Michelle Morris.

Aggregation in Criminal Law

Brandon L. Garrett

This Article considers aggregation in criminal law. In criminal law, fundamental constitutional rights to an individual day in court sharply limit the occurrence of procedural aggregation, such as joinder, during trials. By way of contrast, in civil cases, courts permit a range of aggregate litigation, including consolidation and class actions. Nevertheless, the boundaries between civil and criminal law approaches to aggregation are more permeable than conventionally understood. Courts now aggregate criminal cases, and they do so without violating constitutional rights, by joining cases only before trial and during appeals. I present five case studies examining novel aggregative procedures that courts employed to remedy systemic criminal procedure violations such as the lack of proportionality in death sentencing, wrongful convictions, forensic fraud and inadequate indigent representation. Second, I frame due process safeguards to structure future aggregation in criminal law. Finally, I develop a possible second wave of institutional reform that could flow from intermediate models that do not aggregate but accomplish similar goals, using innocence commissions, prosecutorial case review, special masters, and two-tier models of judicial review. I conclude that appropriate use of aggregation can potentially transform criminal adjudication, by providing an avenue to vindicate criminal procedure rights, and by encouraging efforts to create a more efficient, accurate, and fair criminal justice system.

INTRODUCTION

Imagine that a prisoner whose conviction was based chiefly on blood evidence from the crime scene asserts his actual innocence. He believes that a state forensic technician fabricated blood evidence and lied to the jury. Suppose that the state forensic laboratory did falsify the inculpatory blood evidence not just in this prisoner's case, but in over a hundred other criminal trials. Alone, each prisoner would face enormous difficulties in obtaining counsel and experts to retest the evidence in his case. Even if a prisoner obtained testing and a court exonerated him, he might never learn of the larger pattern of misconduct. He certainly could not enjoin reform of the laboratory responsible for his mistaken conviction.

Courts are beginning to address the practical obstacles to system-wide relief in criminal cases by adopting novel forms of aggregation. By

aggregation, I mean procedural aggregation—formal disposition of common issues or claims in more than one case using techniques such as joinder, consolidation, or a class action.[1] For example, the West Virginia Supreme Court responded to the scenario just described by appointing a special master, counsel, and experts for a group of 133 persons convicted based on the state laboratory's possibly fabricated blood evidence.[2] As a result, a number of innocent prisoners were exonerated and released, and the court ordered structural reform of laboratory practices to prevent future miscarriages of justice.[3] Aggregation allowed the court to remedy a "corruption of our legal system" that might otherwise have evaded review.[4]

Such aggregation in criminal law has gone unnoticed by scholars. Courts have only infrequently aggregated criminal cases, in part because aggregation seems to run against the grain of our constitutional criminal procedure.[5] The Supreme Court has held that the Constitution guarantees a fundamental right to an individual, not an aggregate, jury determination regarding each element of a crime necessary to prove guilt.[6] For that reason, courts rarely aggregate criminal trials, joining only factually-related cases of co-conspirators or co-participants.[7] After all, during joint trials, criminal courts risk punishing the innocent through guilt by association, conflicted counsel, and violating certain bedrock constitutional rights.[8]

The civil system exists in a different world where courts permit a variety of aggregative mechanisms: not just joinder, but also consolidation and the most complex and controversial development in modern procedure—the class action.[9] In permitting class actions, the Supreme Court recognized that aggregation, despite creating an "inherent tension"

---

1. I use that definition throughout this Article. Similarly, *Black's Law Dictionary* defines aggregation as "consisting of many persons united together" and referring to joinder of parties. *See* BLACK'S LAW DICTIONARY 64 (6th ed. 1990); *see infra* Part I.C.

2. *See In re* an Investigation of the W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 502-03 (W. Va. 1993).

3. Maurice Possley et al., *Scandal Touches Even Elite Labs*, CHI. TRIB., Oct. 21, 2004, at 1; *see also infra* Part II.A.

4. *In re W. Va. State Police Crime Lab.*, 438 S.E.2d at 508.

5. Scholars have never examined or discussed aggregation in criminal law, either in the sense of joining cases together regarding criminal procedure rights, before trial, or on appeal. To help navigate this unexplored terrain, I turn to civil categories of aggregation and accompanying due process rules. *See infra* Part III.A. This Article also provides the first piece of a larger project mapping a field of complex criminal litigation. For example, the following two articles examine systems of emergency criminal procedure and structural reform remedies pursued by prosecutors. *See* Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L. J. 127 (2006); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 127 (forthcoming 2007).

6. U.S. CONST. amend. VI; *In re* Winship, 397 U.S. 357, 363-64 (1970); *infra* Part I.A.

7. As I discuss in *infra* Part I.A, in criminal cases joinder remains strictly limited.

8. *See infra* Part I.A for discussion regarding the role of Bill of Rights protections.

9. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1377 (2000).

with the "day-in-court ideal,"[10] creates economies of scale enabling courts to remedy rights with individually low value that would otherwise "be without any effective redress."[11]

The strict line between criminal and civil cases regarding aggregation is more flexible than it would first appear. Indeed, a number of courts have begun to do what appeared beyond the pale in criminal law—to aggregate criminal cases. They have even done so while adhering faithfully to the Supreme Court's admonition that the guilt of each defendant must be proved beyond a reasonable doubt. Courts aggregated regarding limited issues—criminal procedure rights distinct from individual questions of guilt decided by the jury. Such criminal procedure rights, affirmatively asserted by persons charged with crimes, may arise outside of the trial phase, both before trial or after conviction during post-trial appeals.[12]

In order to remedy systemic violations of criminal procedure rights, courts have experimented with a variety of aggregative approaches. In each of the five case studies I present, courts sought to identify, analyze, and then correct systemic problems of the criminal system. In addition to the West Virginia court that investigated and remedied forensic fraud, other courts have aggregated post-trial death penalty cases to examine racial disparity in sentencing, aggregated claims that the state provided inadequate indigent defense representation, and consolidated federal habeas corpus petitions.[13]

In this Article, I use five case studies to explore the procedural and remedial significance of aggregation as an emerging element, if not a new paradigm, of our criminal justice system. I propose that the Supreme Court embrace the grassroots innovations of courts that have aggregated cases to provide remedies for systemic violations of criminal procedure rights. Further, where criminal law lacks significant precedent for aggregation, much less functional categories guiding its use, I develop a due process model to structure future criminal law aggregation.[14]

Such a due process model has special salience where aggregation in criminal law risks replicating or magnifying existing disparities in the criminal justice system. Suppose that the West Virginia Supreme Court discussed above was overburdened. Rather than appoint a special master, counsel, and experts for purposes of investigating the forensic fraud, the court transferred a hundred petitions with similar allegations to a magistrate. Suppose the magistrate then refused to appoint the prisoners a lawyer or hold a hearing, but instead rendered a decision summarily

10. Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999); *see also infra* Part I.C.
11. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).
12. *See infra* Part II.
13. *See id.*
14. *See* discussion *infra* Part I.C.

denying relief based solely on the State's bare representation that the lab employed sound practices. In such a situation, the Supreme Court's insistence that the criminal justice system resist the pull of administrative efficiency seems warranted.[15] Each of the procedural issues raised by this hypothetical—namely, non-party preclusion, the potential for inadequate representation, and the lack of exit rights—is addressed by my due process framework, which is designed to curb the possible abuses aggregation in of our "overworked criminal justice system."[16]

Our criminal justice system does not lack the means to achieve economies of scale. Legislatures, courts and attorneys channel and sift criminal cases at all stages using prosecutorial discretion, plea agreements, docket management, substantive criminal law, mandatory sentencing schemes, post-conviction rules, and specialized courts.[17] Given the ready availability of those powerful organizing tools to systematize disposition of cases, courts need not use aggregation just to achieve judicial economy or uniform results. The five case studies suggest that aggregation instead serves a broader constitutional and remedial purpose. Courts adopted aggregation in criminal law because it provided the means to ameliorate systemic violations of defendants' criminal procedure rights that would otherwise "be without any effective redress."[18] Aggregation empowers not just courts but also victims of constitutional violations by creating opportunities to enjoin systemic criminal procedure violations and craft structural reforms for institutions; pool information about the existence and causes of recurring violations; secure legal representation and expert assistance; and achieve greater equality than in the adjudication of individual cases.

Finally, I suggest that aggregation by courts could assist a second wave of grassroots innovation by encouraging other institutions to adopt

---

15. The untold story of the demise of the habeas corpus class action, discussed *infra* Part I.D., also demonstrates the importance of due process protections. No scholars have discussed habeas class actions other than a student in a note from 1968, written the year after the first habeas class action was brought. *See* Note, *Multiparty Federal Habeas Corpus*, 81 HARV. L. REV. 1482 (1968). For two decades federal courts certified habeas class actions brought by petitioners alleging their convictions were unconstitutional. Those class actions have vanished, and for good reasons, due to harsh preclusive effects under the new federal habeas statute, which prevents all class members from bringing subsequent habeas petitions with their individual claims. *See infra* Part I.D.2.

16. Blakely v. Washington, 542 U.S. 296, 338 (2004) (Breyer, J., dissenting); *see infra* Part III.A.

17. *See infra* Part I.B. In civil law, the American Law Institute draft "Principles of the Law of Aggregation" terms such proceedings that coordinate separate lawsuits for efficiency as "Administrative Aggregations," distinct from "Joinder Actions" that join multiple parties and "Representative Actions" in which a party represents a class. *See* American Law Institute, *Principles of the Law of Aggregate Litigation* (April 21, 2006) (draft on file with author). I instead use the terms institutional systematization and institutional reform to describe various "administrative aggregation" phenomena in criminal law. *See infra* Part I.B, III. The ALI draft does not consider aggregation in criminal law, but instead limits its principles to civil suits only, excluding bankruptcy. *See id.* at 3.

18. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

reforms to prevent recurring criminal justice errors. Institutional reform could include innocence commissions, models of prosecutorial review, special masters, and a system of two-tiered review. In the post-DNA era, mounting scientific evidence that innocent persons are wrongly convicted suggests reasons for institutions to develop such responses.[19] Nevertheless, where self-regulation fails, court should aggregate cases to provide systemic remedies and deter future violations.

This Article proceeds in three parts. Part I examines why courts rarely use aggregation in criminal law, beginning with the Supreme Court's resistance to aggregation in its focus on the individual criminal defendant's right to a "day in court," viewed against many features of the criminal system that already promote uniformity. Part I then contrasts the Court's tolerance of aggregation in the civil arena—including because it facilitates remedies for violations of constitutional rights—with how the Court hastened the demise of the habeas corpus class action designed to accomplish that very purpose regarding criminal procedure rights. The Court's apparently strict boundaries between civil and criminal procedure remain somewhat permeable. Part II presents evidence of a new conception of aggregate criminal adjudication: five case studies of aggregation in criminal law, conducted by four state supreme courts and a federal circuit court regarding criminal procedure rights in order to remedy systemic problems. Part III argues that the Supreme Court should embrace a functional due process framework focusing on preclusion, adequate representation, and exit rights, to structure aggregation in criminal law. Part III concludes by examining alternative institutional reform models such as innocence commission review of wrongful convictions, use of special masters to review federal habeas corpus petitions, prosecutorial case review, and two-tiered appellate review, that each may supplement aggregation to remedy systemic violations of criminal procedure rights.

I
CIVIL AND CRIMINAL APPROACHES TO AGGREGATION

A. Aggregation in Civil Law

I have defined aggregation as procedural aggregation, that is, judicial joinder of common issues or claims in more than one case, using techniques such as simple joinder, consolidation, or class actions. To understand why the criminal system does not appear to adopt such procedural aggregation, and what kinds of aggregation could emerge in criminal law, it is useful to first review the types and purposes of aggregation in civil law, where modern aggregation originated. While

19. *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 42-46, 51-53 (2005) [hereinafter Garrett, *Federal Wrongful Conviction Law*].

criminal courts use joinder only in limited circumstances, civil courts use a range of techniques to aggregate. In fact, the Court's functional approach to aggregation in civil cases "calls for such procedural protections as the particular situation demands."[20] These categories of aggregation include: joinder, consolidation, and several types of class actions.[21]

Civil joinder, as in criminal law, is limited to factually-related cases under a transaction test, to avoid prejudice to those bound.[22] However, in civil cases, joinder may sometimes be compelled, and outside parties may intervene as well.[23]

Consolidation permits courts to more broadly join civil cases for a "joint hearing or trial" when they involve "common questions of law or fact."[24] This includes consolidation of federal multi-district litigation through venue transfer,[25] often in mass tort cases.[26]

Class actions provide the most important model for aggregation in criminal law. The class action mechanism, governed by Rule 23 of the Federal Rules of Civil Procedure, permits a representative of a class to join and bind claims of persons not before the court as formal parties.[27] Recognizing an "inherent tension" between "collectivism" and the "deep-

20. Morrissey v. Brewer, 408 U.S. 471, 481 (1972); *see also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 319 (1950) (holding that due process requires "notice reasonably certain to reach most of the interested" parties given a class with a "large number of small interests").

21. Courts also use methods of aggregation in bankruptcy proceedings and interpleader. *See* 11 U.S.C. § 362 (2000); FED. R. CIV. P. 22.

22. FED. R. CIV. P. 20 (permissive joinder of parties asserting relief "arising out of the same transaction, occurrence, or series of transactions or occurrences").

23. FED. R. CIV. P. 19 (compulsory joinder of necessary and indispensable parties); FED. R. CIV. P. 13(h) (permits joinder of parties relevant to cross claims); FED. R. CIV. P. 14(a)-(b) (permits impleader of derivatively liable third parties); FED. R. CIV. P. 24 (permits multiple types of intervention).

24. FED. R. CIV. P. 42(a); *see also* Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496-97 (1933) ("[C]onsolidation is permitted as a matter of convenience and economy in administration."); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 414 n.138 (2000).

25. *See* 28 U.S.C. § 1404(a) (2000); *see also* Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 26 (1960) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent."). In civil cases federal courts can consolidate pre-trial "multidistrict litigation" "pending in different districts," when civil actions "involve[] one or more common questions of fact" and to "promote the just and efficient conduct of such actions"; such actions are remanded to originating districts for trial. 28 U.S.C. § 1407(a) (2000).

26. Examples of consolidation include: *In re* Asbestos Prods. Liab. Litig., 1993 WL 463301, at *1 (J.P.M.L.) (39,000 asbestos actions); *In re* Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098, 1098 (J.P.M.L. 1992) (78 breast implant cases); *In re* A.H. Robins Co. "Dalkon Shield" IUD Prods. Liab. Litig., 406 F. Supp. 540, 541 (J.P.M.L. 1975) (54 Dalkon Shield cases).

27. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on bebalf of all . . . .").

rooted historic tradition that everyone should have his own day in court,"[28] the drafters of the federal rules created each category of class action to secure due process protections for class members appropriate to the nature of the claims and the relief sought. The Rule creates two broad types of class actions: voluntary and mandatory. Voluntary Rule 23(b)(3) class actions can be formed when the claims of class members have common "questions of law or fact" and "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."[29] In order to protect class members' due process rights, Rule 23 requires that class members be afforded notice and an opportunity to opt-out.[30] Further, such class actions can be maintained on specific "issues," that is, not entire legal claims, but distinct legal or factual questions common to the class.[31] Rule 23(b) also provides for several types of mandatory class actions in which plaintiffs need not provide potential class members with individual notice and an opportunity to opt-out,[32] since the remedy sought would as a practical matter bind all parties regardless.

Aggregation, in all of its varied forms, serves several functions. The "policy at the very core" of aggregation is that of efficiency.[33] In situations where low-value cases would not be "economically feasible" if brought alone, the Court notes that "aggrieved persons may be without any effective redress unless they may employ the class-action device."[34] Through aggregation, both plaintiffs and defendants avoid costs of piecemeal litigation, and courts benefit from the resulting economies of scale.[35] Aggregation not only permits efficient adjudication, but it can also improve the quality of adjudication, including its accuracy and fairness. More resources can be pooled in an aggregate case, both in representation and in expert and judicial resources. Class members can pool information regarding the causes of their alleged injuries, permitting aggregate

28. Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (quoting Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 417 (1981))).

29. FED. R. CIV. P. 23(b)(3).

30. FED. R. CIV. P. 23(c)(2)(B).

31. FED. R. CIV. P. 23(c)(4).

32. *See Ortiz*, 527 U.S. at 834 & n.13. *See generally* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002).

33. Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small reeoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

34. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

35. *See* Advisory Committee Notes to the 1966 Amendments to Rule 23 subdivision (b)(3) ("The burden that separate suits would impose on the party opposing the class, or upon the court calendars, may also fairly be considered.").

discovery, proof and more accurate outcomes.[36] In addition, greater equality may be achieved where cases are uniformly disposed en masse.[37]

A central goal of aggregation is to facilitate the vindication of constitutional and civil rights. At the core of that mission is Rule 23(b)(2), created to promote class actions which, instead of seeking primarily economic or individual relief, seek injunctive or declaratory relief. The rule drafters envisioned the paradigmatic 23(b)(2) case as a civil rights class action, such as one that seeks to enjoin unconstitutional race discrimination.[38] All of the benefits of aggregation discussed, including access to representation, expert assistance, information, and judicial resources, empower plaintiffs seeking injunctive remedies for constitutional violations.[39] Civil rights cases seeking to demonstrate systemic violations and the need for structural reform particularly benefit from collective information gathering and the deterrent effect of collective participation and judgment (and the award of class-wide attorneys' fees).[40]

Despite its many benefits, aggregation raises unique due process dangers in criminal law that will be explored in Part III. Most of the controversies in class action practice, however, relate not to efforts to enjoin systemic violations of constitutional rights under Rule 23(b)(2), but rather to class actions that chiefly involve economic recoveries. Cases primarily seeking money damages raise perennial problems of adequacy of representation, where attorneys may be opportunistically motivated more by their own recovery rather than by the interests of all class members.[41]

---

36. *See id.*

37. *See* Advisory Committee Notes to the 1966 Amendments to Rule 23 ("Actions by or against a class provide a ready and fair means of achieving unitary adjudication."); *In re* Ephedra Prods. Liab. Litig., 314 F. Supp. 2d 1373, 1374 (J.P.M.L. 2004) ("Centralization under Section 1407 is thus necessary in order to avoid duplication of discovery, prevent inconsistent or repetitive pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary.").

38. *See* Advisory Committee Notes to the 1966 Amendments to Rule 23, subdivision (b)(2) ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class"); 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 4.11, at 4-37 (stating that the provisions of Rule 23(b) were "designed specifically for civil rights cases seeking broad declaratory or injunctive relief"); *see also* George Rutherglen, *Title VII Class Actions*, 47 U. CHI. L. REV. 688 (1980).

39. *But see* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1226-28, 1235 (2005) (noting recent Supreme Court rulings that make obtaining aggregate relief in civil rights cases more difficult).

40. *See, e.g.*, Lesley Frieder Wolf, Note, *Evading Friendly Fire: Achieving Class Certification After the Civil Rights Act of 1991*, 100 COLUM. L. REV. 1847, 1848 & n.4 (2000).

41. *See* Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 927 (1998); *see also* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 195 COLUM. L. REV. 1343, 1348-62 (1995) [hereinafter Coffee, *Class Wars*]; John C. Coffee, Jr., *Understanding the Plaintiff's Attorney:The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469 (1994).

For these reasons, the Court has held that due process permits preclusion of non-parties in class actions only on the condition that they are "adequately represented by someone with the same interests who is a party."[42] Thus Rule 23 also requires that courts carefully inquire into the adequacy of counsel.[43] Further, the Court has exhibited concern with the adequacy of representation in class action settlements by requiring courts to rigorously police their fairness.[44] Thus, civil aggregation, though flexible, retains important due process boundaries.

In summary, the civil system permits several functional categories of aggregation and provides a vehicle to vindicate constitutional rights. In contrast, the remedial purpose of aggregation has been neglected in our criminal system, due both to strict limits aimed at preserving the individual criminal defendant's right to a day in court and to institutional systematization in the criminal law system.

B. The Individualized Criminal System

Aggregation remains a largely unused method of criminal adjudication in the United States. Where core individual rights are at stake in criminal trials, the Supreme Court has repeatedly ruled that every criminal defendant deserves an individual "day in court." The Court has accordingly developed a rigid set of rights that appear to preclude any significant aggregation of criminal cases.[45] Most dramatically, the Court invoked these principles in recent decisions regarding sentencing guidelines.[46] A look at the institutions that dominate the criminal system further explains the lack of aggregation in criminal law. Repeat players, such as criminal courts, prosecutors and public defenders, can achieve economies of scale without aggregation, by coordinating, channeling and settling cases, all in the shadow of strict sentencing rules that routinize outcomes. Yet the criminal system lacks mechanisms to remedy systemic violations of criminal defendants' core constitutional rights. Those constitutional criminal procedure rights include: the right to effective assistance of counsel, the right to have exculpatory evidence disclosed, and the right to be free from suggestive eyewitness identifications, coerced custodial interrogations and the fabrication of evidence.

---

42. Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (citing Hansberry v. Lee, 311 U.S. 32, 41-42 (1940) and FED. R. CIV. P. 23).

43. FED. R. CIV. P. 23(g)(B); *see also* FED. R. CIV. P. 23(a).

44. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20, 627 (1997) (class action settlement must provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected"); *see also* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 349-66, 371 (2000) [hereinafter Issacharoff, *Governance*].

45. *See* Rock v. Arkansas, 483 U.S. 44, 51 (1987) (quoting *In re* Oliver, 333 U.S. 257, 273 (1948)).

46. *See, e.g.*, United States v. Booker, 543 U.S. 220, 233 (2005).

1. Criminal Trials

Unlike the civil system, the criminal system overwhelmingly prosecutes single defendants with only the sporadic and procedurally-restricted group trial involving conspiracies or co-participants. One explanation for the dearth of procedural aggregation in criminal law is that the Supreme Court has ruled that because reputation, liberty, or even life may be at stake during criminal trials, those proceedings must be highly individualized. The Due Process Clause and the Sixth Amendment require, as a "bedrock axiomatic and elementary principle," a jury trial and proof to a jury beyond a reasonable doubt of every fact necessary to prove each element constituting a crime.[47] The Sixth Amendment also gives structure to the day in court, enumerating additional rights to a speedy, public trial, notice of the charges, confrontation of witnesses, and an impartial jury.[48] In criminal cases, those rigid constitutional constraints bar all methods of aggregation but simple joinder.

Even simple joinder in criminal cases is strictly limited by a transaction test: criminal defendants may be jointly tried only when they participated in the same acts or transactions.[49] In cases involving shared conduct, courts may still order separate trials due to Confrontation and Due Process Clause protections against the dangers of guilt by association.[50] Further, group representation by the same attorney rarely occurs in criminal cases, unlike in civil cases where common counsel can represent an entire class.[51] The Supreme Court protects the right to effective counsel as a "fundamental right of criminal defendants."[52] The Court presumes prejudice and violation of the Sixth Amendment right to counsel

47. *See* U.S. CONST. amend. VI; Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"); *In re* Winship, 397 U.S. 358, 363-64 (1970) (internal citation omitted) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *see also* Holloway v. Arkansas, 435 U.S. 475 (1978) (reversing joint representation of codefendants with conflicting interests absent showing of prejudice).

48. *See* U.S. CONST. amend. VI.

49. *See* FED. R. CRIM. P. 8(b) ("The indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction . . . ."). Defendants must show prejudice to obtain a severance, and the decision whether to grant a severance is within the discretion of the trial judge. *See* FED. R. CRIM. P. 14; Zafiro v. United States, 506 U.S. 534, 537-40 (1993).

50. On the danger of guilt by association, *see* United States v. McVeigh, 169 F.R.D. 362, 371 (D. Colo. 1996) (ordering separate trials due to "unacceptable risk" of a Confrontation Clause violation should Timothy McVeigh and Terry Nichols (who were both accused of plotting the Oklahoma City bombing) be tried jointly); Bruton v. United States, 391 U.S. 123, 134 (1968) (holding that introduction of co-defendant's confession inculpating defendant violated the Confrontation Clause); Uphaus v. Wyman, 360 U.S. 72, 79 (1959) ("[G]uilt by association remains a thoroughly discredited doctrine.").

51. *See infra* Part I.C.

52. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986); *see also* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

when courts require joint representation at trial.[53] When defendants waive conflicts and agree to joint representation, courts still must inform them of the risks of joint representation and ensure that no prejudice arises.[54] In group trials, defendants each retain a right to individual sentencing.[55] Thus, criminal trials remain largely individualized. Even in situations involving group crime, the law entitles defendants to individualized jury determinations regarding each element of the crime, as well as individualized representation and sentencing.

2. Institutional Systematization

Despite occasional joint trials, the American criminal law ideal remains one of a binary prosecution of a single criminal defendant, by a public prosecutor, with a jury empanelled to decide, beyond a reasonable doubt, each element relevant to an individual's guilt or innocence. A second explanation for the apparent lack of aggregation in criminal adjudication is the relative lack of pressure to resolve common cases through aggregate procedures. This explanation focuses on the institutional reality of our criminal system. The individual criminal procedure ideal conforms to black letter constitutional law; the Supreme Court calls the criminal trial the "main event,"[56] and focuses its constitutional rulings on that event. However, those rulings disguise how exceedingly rare criminal trials remain. Criminal trials have been more accurately described as "island[s] of technicality in a sea of discretion."[57]

Unlike in the civil system, whether and how a criminal case is investigated and tried, depends to a great degree on the preferences and

53. *See* Holloway v. Arkansas, 435 U.S. 475, 485, 488 (1978) (holding that "an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted" and that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic"); Glasser v. United States, 315 U.S. 60, 70 (1942) (holding that requiring an attorney to represent two codefendants in conspiracy case whose interests were in conflict denied Sixth Amendment right to the effective assistance of counsel).

54. A defendant may formally waive the right to assistance of an attorney unhindered by a conflict of interest, *Glasser*, 315 U.S. at 70, but federal courts are required under FED. R. CRIM. P. 44(c) to hold a hearing to "personally advise" defendants to ensure that they understand their right to separate representation and the risks of joint representation. Even given a valid waiver, the district court has a responsibility to "take appropriate measures to protect each defendant's right to counsel" unless there is "good cause to believe that no conflict of interest is likely to arise." *Id.*

55. The Sentencing Guidelines require individualized sentencing based on degree of participation. *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (1998) (reduction for a minor participant); U.S. SENTENCING GUIDELINES MANUAL § 3B1.1(c) (1998) (enhancement for a manager or supervisor); *see also* Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771 (2003). Individualized sentences are required despite the fact that "most courts require only 'slight evidence' connecting the defendants to the conspiracy for a conviction," unless a person withdraws from a conspiracy. Beth Allison Davis & Josh Vitullo, *Federal Criminal Conspiracy*, 38 AM. CRIM. L. REV. 777 (2001).

56. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

57. Livingston Hall & Sheldon Glueck, CASES ON CRIMINAL LAW AND ITS ENFORCEMENT 3 (1st ed. 1951).

discretion of powerful institutional actors. Far more so than in civil law, repeat players dominate the criminal system. In turn, those players—law enforcement, legislatures, judges, defense lawyers and prosecutors—help define the rules of the system.[58] Methods of coordinating, channeling, settling, and disposing of criminal cases, from plea bargaining, prosecutorial discretion, specialized courts, to strict sentencing rules, each categorize cases, although they do not call on courts to engage in aggregation or render group decisions.[59]

I call such processes in which repeat players in the criminal system seek to regiment disposition of cases and take advantage of certain economies of scale, but without procedural aggregation, "institutional systemization." The systematizing roles of the dominant criminal law actors—law enforcement officers, legislatures, judges, defense lawyers and prosecutors—remain distinct in their impact on criminal law outcomes.[60] First, local law enforcement personnel exercise broad investigatory discretion which often determines whether a case is later prosecuted.[61] Second, legislatures define substantive criminal law, with a recent "severity revolution" vastly enhancing sentences and the scope of criminalization in state and federal courts.[62] During this "twenty-five-

58. *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

59. On analogous informal arrangements among plaintiffs' attorneys in civil cases, termed "informal aggregation," *see* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (describing history of informal, burcaucratized aggregate settlement structures in American tort law); Erichson, *supra* note 24, at 386-409 (describing informal coordination by counsel in "non-class" civil litigation).

60. *See* Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 HARV. J.L. & PUB. POL'Y 357, 366-68 (1986); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27-30 (1993). On the history of the rise of plea bargaining, *see* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 893-94 (2000). On passage of federal habeas corpus after the Civil War, *see* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE §§ 2.1-2.6 (2001); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1031-32 (1985). On how mounting tort dockets from personal injury cases in a rapidly industrializing society produced sustained pressure on courts to speed disposition of criminal cases, *see* Fisher, *supra* at 996-1001, 1074; *see also supra* notes 37-38.

61. In response, the Warren Court's due process "revolution" created a series of individual procedural rights that define the modern criminal law day-in-court ideal discussed in the last section. *See* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (1966); *see also* David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1728-31, 1736-41 (2005). The Court also enhanced collateral review of constitutional error at trial in federal courts. *See* Brown v. Allen, 344 U.S. 443 (1953); Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 66, 77-80 (1994).

62. TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, AMERICAN BAR ASSOCIATION, THE FEDERALIZATION OF CRIMINAL LAW (1998); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 902, 929-32 (1991); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 25-27 (1997). [hereinafter Stuntz, *Uneasy Relationship*]

year national experiment with mass incarceration,"[63] the Supreme Court returned discretion and power to local law enforcement actors, requiring lower courts to defer to state findings and engage in more cursory, limited procedural disposition of cases intended to promote judicial economy, finality, and federalism.[64] Congress then codified many of those restrictive rules in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[65]

Third, judges play a central systematizing role in directing specialized criminal courts, as they supervise the intersection of each of the other institutional actors in their courtrooms. Judges manage the defense lawyers and prosecutors appearing before them, control criminal dockets, rule on the scope and nature of criminal law, influence which cases are tried or settled, and influence legislation.[66] Appellate courts in particular benefit from deferential procedural rules that limit the relief that petitioner's can obtain in criminal cases, as well as limiting availability of legal representation during criminal appeals.[67] Appellate decisions affect groups of cases without procedural aggregation, by setting legal precedent and applying it to subsequent cases using stare decisis. While the Supreme Court, for example, did not join all death penalty cases in *Furman v. Georgia*, the Court's holding overturned every death sentence in the country.[68]

---

63. Frank O. Bowman, III, *Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495, 497 (2005); *see also* THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, 1, 2 tbl.1 (2003), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf; INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

64. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 491 (1991); Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485 (1995); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993).

65. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in various sections of title twenty-eight of the United States Code). The AEDPA, among other changes, severely limited the standard of review of habeas petitions, barred hearings on facts not presented in state court absent a convincing showing of innocence, and banned "successive" petitions on any claim. *See* 28 U.S.C. §§ 2244(a)-(b), 2253(c)(2) (2000).

66. On the role of elected state criminal judges in controlling appointment of defense counsel, influencing legislation affecting the criminal system, and deferentially reviewing decisions by trial judges, *see* Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000).

67. *See infra* notes 85, 124.

68. Furman v. Georgia, 408 U.S. 238 (1972). The Court's recent sentencing guidelines decisions similarly have had system-wide effects on dispositions. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 508 (2000); *see infra* notes 73-82 and accompanying text.

Fourth, almost all criminal defendants are indigent and represented by institutional and repeat player public defenders, who often have severe resource constraints and thus are incentivized to plea bargain their cases.[69]

Finally, our present system dramatically systematizes cases before prosecutors, the ultimate repeat players, since they litigate all criminal cases. Indeed, prosecutors resolve almost all criminal cases without trial using plea bargaining based on internal rules and procedures.[70] Reinforcing their power, statutes and sentencing guidelines arm prosecutors with wide discretion. The resulting domination of plea bargaining has been described as more akin to "what common lawyers would describe as a non-adversarial, administrative system of justice."[71] The reasons include that "the traditional adversarial model has become too expensive, contentious, and inefficient to be restored."[72] Though litigants remain formally entitled to an individual day in court, courts try few cases, and informally, prosecutors provide a de facto forum for bargaining in which they define the flexible administrative standards that largely determine outcomes.[73]

Despite the trend of ever-increasing institutional systematization in criminal law, the Supreme Court set strict limits when it intruded on forbidden territory—the elements of a crime that must be proved beyond a reasonable doubt at trial. The national movement toward using complex rules to achieve uniformity and efficient dispositions and, in doing so, enhancing institutional discretion of prosecutors, reached an apex with Congress's passage of the U.S. Sentencing Guidelines in 1984.[74] Congress and state legislatures enacted sentencing guidelines to impose consistent standards on criminal cases by requiring judges to follow rigid rules at the sentencing stage: the 258-box grid of the U.S. Sentencing Table scores on one axis of the grid the defendant's prior record and on the other axis the seriousness of the crime.[75] Judge Pierre N. Leval noted the cost to

69. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, INDIGENT DEFENSE STATISTICS, *available at* http://www.ojp.usdoj.gov/bjs/id.htm (finding that in the 100 most populous counties, spending on indigent defense "represents an estimated 3% of all local criminal justice expenditures used for police, judicial services, and corrections in these counties"); Stuntz, *Uneasy Relationship*, *supra* note 62, at 7, 10-11 (citing data that state and local spending for proseeutors tripled from 1971 to 1990 and spending on police rose 60%, while spending on indigent defense per case "declined significantly").

70. *See* Mitchell v. United States, 526 U.S. 314, 324-25 (1999) ("Over 90% of federal criminal defendants whose cases are not dismissed enter pleas of guilty or *nolo contendere*.") (citations omitted); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 956 (3d ed. 2000) ("In the United States, the great majority of criminal cases are disposed of by plea of guilty rather than by trial.").

71. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118, 2142 (1998).

72. *Id.*

73. *Id.* at 2118; *see also* Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 715 (2005) (exploring the role of administrative agencies in criminal sentencing).

74. *See* Alschuler, *supra* note 62.

75. U.S. SENTENCING GUIDELINES MANUAL § 3 (1998).

individualized review: "Offender characteristics have been virtually excluded from the guideline grid calculation. . . ." [76] In response, the Supreme Court emphasized the individual day in court ideal in its line of decisions including *United States v. Booker*,[77] *Blakely v. Washington*,[78] and *Apprendi v. New Jersey*.[79] In each decision the Court ruled that a sentencing guidelines scheme had unconstitutionally assigned factfinding authority to a judge, not the jury, invoking the strict rule that elements of a crime must be proved to a jury beyond a reasonable doubt.[80] Although such sentencing guidelines do not join cases together through procedural aggregation, but instead merely create generally applicable rules, the Court used anti-aggregation rhetoric in *Blakely*, rejected "the civil-law ideal of administrative perfection,"[81] noted how judges are "increasingly bureaucratic," and disparaged the "bureaucratic realm of perfect equity," because though the jury trial "has never been efficient . . . it has always been free."[82] Though the Court aimed to preserve an individualized day in court, dissenters pointed out that the Court failed to recognize the overwhelming disposition of cases by plea-bargaining.[83]

Though the Supreme Court still invokes an individual day in court ideal, the developments outlined indicate a rising tide of rules and institutional arrangements that, without calling for courts to aggregate using joinder of cases, nevertheless define the day in court that defendants are entitled to receive, but which in practice they overwhelmingly do not receive.

---

76. United States v. Rodriguez, 724 F. Supp. 1118, 1120 (S.D.N.Y. 1989). Judge Leval presciently noted that the Guidelines might only be constitutional if judges have the power to depart from them. *See* United States v. Booker, 543 U.S. 220, 233 (2005) ("[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges.").

77. 543 U.S. 220 (2005).

78. 542 U.S. 296 (2004).

79. 530 U.S. 508 (2000).

80. *See Booker*, 543 U.S. at 230 ("It has been settled throughout our history that the Constitution protects every eriminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'") *In re* Winship, 397 U.S. 358, 364 (1970).

81. 542 U.S. at 313 (2004). Similarly, in *Booker*, the Court explained that the right to a jury trial "enshrined in the Sixth Amendment - has always outweighed the interest in eoncluding trials swiftly" and quoted Blackstone that "doubtless all arbitrary powers, well executed, are the most *convenient*." *Booker*, 543 U.S. at 244; *see also* Alschuler, *supra* note 62, at 918-24.

82. 530 U.S. at 498 (Scalia, J., concurring).

83. *Blakely*, 542 U.S. at 316, 321 (O'Connor, J., dissenting). The Court in *Blakely* recognized only in passing the reality of plea bargaining, stating: "the Sixth Amendment . . . guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place." *Id.* at 312.

C. A Case for Aggregation in Criminal Law

In our current criminal system, repeat players generate the means to achieve vast economies of scale resulting in fewer criminal trials and therefore fewer opportunities to vindicate criminal procedural rights at trial. While efficient for repeat player actors, the system does not accomplish one of the central purposes of aggregation: to provide a vehicle for the vindication of constitutional rights. In our criminal system, individual defendants and prisoners face great difficulty obtaining any remedy for errors, and far more substantial obstacles hinder legal efforts to enjoin persistent patterns of constitutional criminal procedure violations. The reasons have little to do, however, with any individual right to a day in court.

One reason few individuals secure judicial relief for constitutional violations remains that given the dominance of prosecutorial-driven plea bargains, almost all cases result in guilty pleas; the Court has held that "a defendant who pleads guilty forgoes a fair trial as well as various other accompanying constitutional guarantees."[84] In the few cases that do proceed to trial, strict post-conviction rules create a "maze of procedural barriers" to relief—including limiting rules in the AEDPA, procedural default, harmless error, exhaustion, and non-retroactivity doctrine—that substantially close off appellate remedies for constitutional criminal procedure violations at trial.[85] For that reason, the core criminal procedure claims directed at police and prosecutorial misconduct—such as *Brady* claims, suggestive eyewitness identification claims, coerced confession claims, and fabrication of evidence claims—rarely succeed.[86]

Further, individual appeals lack a recognized avenue to raise patterns of systemic error. One model for criminal law aggregation vindicating systemic violations of constitutional rights could be the same as in the civil context: civil class actions. Beginning in the 1960s and 1970s, civil rights litigation ancillary to criminal litigation commonly sought to remedy patterns and practices of police abuse or prosecutorial misconduct. Such civil actions regarding criminal cases, however, now face substantial doctrinal roadblocks and rarely result in relief.[87] Civil actions regarding

---

84. United States v. Ruiz, 536 U.S. 622, 623 (2002).

85. HERTZ & LIEBMAN, *supra* note 60, at 112-19 (summarizing limitations in the AEDPA); Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313, 318-19 (1999); Rudovsky, *supra* note 39, at 1249-54 (summarizing federal habeas corpus and harmless error limits).

86. Available evidence indicates the vast majority of post-conviction claims are dismissed for procedural reasons unrelated to the merits. *See* VICTOR E. FLANGO, STATE JUSTICE INSTITUTE, HABEAS CORPUS IN STATE AND FEDERAL COURTS 45-59 (1994), *available at* http://www.ncsconline.org/WC/Publications/KIS_StaFedHabCorpStFedCts.pdf#search=%22habeas%20tudy%22; *see also* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 69-77.

87. *See, e.g.*, Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 1 (2001) (describing a litany of obstacles faced by class actions seeking relief against discriminatory law

police investigations, such as search and seizure claims, may occasionally be brought as class actions[88] yet, the Court has sharply limited injunctive relief against law enforcement, based on doctrines of federalism, comity and deference.[89]

In contrast, not even the narrow avenue of civil rights class actions remains available to attack systemic violations of criminal procedure rights of persons charged with crimes, during their prosecutions, criminal trials, or criminal appeals. Such criminal procedure rights cannot be effectively remedied in civil rights actions for several reasons. The Supreme Court adopted doctrines particularly deferential to criminal justice actors, barring outright any suits seeking to enjoin pending criminal prosecutions,[90] barring outright civil suits challenging a conviction until an acquittal or vacatur of the criminal conviction,[91] and finding prosecutors absolutely immune from civil damages.[92] The combined effect of those rulings nearly entirely closes off civil remedies for violations of criminal procedure fair trial rights.[93]

The existence of at least some persistent, recurring problems in our criminal system is fairly uncontroversial, and my purposes are modest—I mean to only indicate that there are some recurring errors that could benefit from some mechanism to pursue the aggregate remedies. Data available from a comprehensive study of death penalty verdicts shows that both egregiously incompetent defense counsel and prosecutorial suppression of evidence are frequent and persistent causes of capital reversals.[94] In

---

enforcement) [hereinafter Garrett, *Remedying Racial Profiling*]; Rudovsky, *supra* note 39, at 1210-11, 1226-28, 1236. I have described elsewhere possible transformative effects of individual civil wrongful conviction suits seeking damages (and sometimes resulting in injunctive settlements). *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 99-107.

88. *See* Garrett, *Remedying Racial Profiling*, *supra* note 87.

89. *See* City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983) (ruling that standing doctrine limits availability of injunctive relief, particularly as against law enforcement, and urging federal "restraint in the issuance of injunctions against state officers engaged in the administration of the State's criminal laws"); Rizzo v. Goode, 423 U.S. 362, 380 (1976) (limiting availability of injunctive relief against local law enforcement); *see also* Brandon Garrett, Note, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815 (2000) [hereinafter Garrett, *Standing While Black*].

90. *See* Younger v. Harris, 401 U.S. 37 (1971) (holding that federal courts must abstain from enjoining pending state prosecutions except in highly extraordinary circumstances).

91. *See* Heck v. Humphrey, 512 U.S. 477 (1994).

92. Prosecutors remain absolutely immune for their work as officers of the court. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).

93. *See, e.g.*, Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 53-54 (describing the effect of the *Heck* rule and exploring how in a narrow band of DNA exoneration cases, civil suits may have a more powerful deterrent effect); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006) (The Supreme Court in *Lyons* "effectively barred injunctions as a remedy for police misconduct."). *But see* Garrett, *Remedying Racial Profiling*, *supra* note 87, at 61, 76-81.

94. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES 1973-1995, 5 (2000) (finding, in landmark study of rulings during capital appeals, that ineffective counsel

contrast, it is more difficult to draw conclusions from data regarding non-capital cases suggesting few reversals.[95] Nevertheless, given the degree to which repeat players represent both sides in the criminal system, one might naturally expect a range of errors in criminal cases to recur and not to exist in isolation. For example, though ineffective assistance claims are typically raised only in individual cases, indigent defense is provided by local government, and thus gross deficiencies would be likely across entire localities and states if the statutory funding scheme was deficient. Indeed, data from national studies documenting and analyzing ineffective and under-funded indigent defense counsel shows precisely such systemic ineffectiveness.[96] Another data point that has had heightened salience is the surge in exonerations produced by DNA evidence: 196 exonerations to date.[97] The DNA revolution has provided rich information about convictions revealed as erroneous,[98] used by courts, lawmakers, prosecutors, police departments, and social scientists to explore remedies to prevent miscarriages,[99] including in the areas of unreliable or suggestive eyewitness identifications,[100] police or prosecutorial suppression

---

accounted for 37% of reversals and suppression of evidence accounted for sixteen to 19% of reversals).

95. *See* FLANGO, *supra* note 86, at 62 (noting that less than 1% of federal habeas corpus petitions were granted during study period). Several possibilities exist. Perhaps few errors occur, perhaps prisoners fail to raise errors when they do, or perhaps prisoners fail to raise errors properly, resulting in the observed large percentages of cases where courts do not reach the merits due to procedural errors.

96. *See* ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 7-8 (Dec. 2004) [hereinafter ABA REPORT]; THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf (study documenting grossly inadequate indigent defense resources based on data collection in eleven states); THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL 2002 (2003) (comprehensive state by state survey of indigent defense funding); *see also infra* notes 246-250.

97. *See, e.g.*, Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 51-53. I have in draft form a comprehensive study of the criminal appeals brought by DNA exonerees, the causes of those convictions, and the rulings by appellate courts on their claims. *See* Brandon L. Garrett, *Judging Innocence* (on file with author).

98. *See* Samuel R. Gross et al., *Exonerations In The United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005); Innocence Project, Understanding the Causes, http://www.innocenceproject.org/understand/ (last visited Nov. 26, 2002) [hereinafter *Innocence Project Study*].

99. *See, e.g.*, Amy Klobuchar, Nancy K. Mehrkens Steblay & Hilary Lindell Caligiuri, *Improving Eyewitness Identifications: Hennepin County's Blind Sequential Lineup Pilot Project*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 381 (2006) (conducting study of blind sequential lineup procedures in Hennepin County, Minnesota, and finding substantial reduction in potential misidentifications).

100. *See* Gross et al., *supra* note 99, at 540 (finding that a substantial majority of all post-conviction DNA exonerations had eyewitness testimony at trial and, unsurprisingly, almost all erroneous rape cases in the group had victim-identifications at trial); *see also* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 79-88; Garrett, *Judging Innocence*, *supra* note 97 (finding 79% of DNA exonerees were convicted due to an eyewitness identification).

of evidence,[101] coerced confessions,[102] fabrication of evidence,[103] forensic fraud,[104] and inadequate defense counsel.[105] Each of those areas in turn implicates a constitutional criminal procedure right, from fair trial rights established in decisions such as *Manson v. Brathwaite*, *Brady v. Maryland* and *Napue v. Illinois*, to the Sixth Amendment right to counsel and the protections established in *Strickland v. Washington*, and Fifth Amendment protections against police coercion[106] Several of the DNA exonerations have also implicated not just isolated error, but systematic problems in law enforcement, such wholesale fabrication of forensic evidence, wide-spread ineffective assistance of counsel, patterns of *Brady* violations, and patterns of suggestive eyewitness identifications—and as a result, some jurisdictions voluntarily adopted wholesale reforms.[107] False convictions provide unusually egregious examples of "system failure," but the important point for these purposes is not how often failures occur or how

101. According to an Innocence Project study, in 34% of all exonerations, police suppressed exculpatory evidence. Innocence Project, Police and Prosecutorial Misconduct, *available at* http://www.innocenceproject.org/causes/policemisconduct.php. Prosecutors did the same in 37% of exonerations. *Id.*

102. Cases of false confessions account for approximately 16% of DNA exonerations. *See* Garrett, *Judging Innocence*, *supra* note 97; Gross et al., *supra* note 99, at 544-45 (15% of exonerations including non-DNA cases). For analysis of the known cases of false confessions, see Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) and Garrett, *Federal Wrongful Conviction Law, supra* note 19, at 88-94.

103. *See* Garrett, *Judging Innocence*, *supra* note 97 (collecting and analyzing all post-conviction DNA exonerations where informant testimony supported the conviction); Gross et al., *supra* note 99, at 544; *see also* Garrett, *Federal Wrongful Conviction Law, supra* note 19, at 94-99. "Overall, in 43% of all exonerations (146/340) at least one sort of perjury is reported," including by police officers and suborned perjury by jailhouse snitches. Gross et al., *supra* note 99, at 544. Further, "[i]n at least seventeen exoneration cases the real criminal lied under oath to get the defendant convicted." *Id.* at 543.

104. Possley et al., *supra* note 3, at 1 (presenting investigation of 200 death row exonerations since 1986 finding that "more than one quarter involved faulty crime lab work or testimony"); Garrett, *Judging Innocence*, *supra* note 97 (collecting and analyzing all post-conviction DNA exonerations where forensic evidence supported the conviction).

105. *See* Garrett, *Judging Innocence*, *supra* note 97 (collecting and analyzing all post-conviction DNA exonerations where ineffective assistance of counsel claims were brought during appeals); Innocence Project Study, *supra* note 99 (finding 23% of all DNA exonerations due to bad lawyering); *see also* Garrett, *Federal Wrongful Conviction Law, supra* note 19, at 75-76.

106. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) (standard prohibiting coercion during custodial interrogations); Strickland v. Washington, 466 U.S. 668 (1984) (entitlement to effective assistance of defense counsel); Manson v. Brathwaite, 432 U.S. 98 (1977) (describing right to be free from suggestive eyewitness identifications); Brady v. Maryland, 373 U.S. 83, 87-88 (1963) (requiring disclosure of exculpatory evidence); Napue v. Illinois, 360 U.S. 264 (1959) (rule against bad faith fabrication of evidence); Garrett, *Federal Wrongful Conviction Law, supra* note 19, at 75-76.

107. *See* Garrett, *Federal Wrongful Conviction Law, supra* note 19, at 75, 79, 87-88, 93-94, 98-99, 104 (describing reforms in response to wrongful convictions, including new eyewitness identification procedures, open-file policies to prevent *Brady* violations, remedying patterns of forensic fraud in crime laboratories, and videotaping interrogations).

well the system detects them, but rather that the constitutional rights implicated now lack any recognized avenue for aggregate redress.[108]

Thus, in criminal law repeat players that dominate the criminal system achieve economies of scale through informal means. Based on the Court's rulings discussed, however, no meaningful avenues exist for aggregate remedies regarding systemic violations of defendants' constitutional rights. Indeed, as discussed next, the Court hastened the end of the habeas corpus class action, the first attempt to vindicate systemic violations of constitutional rights in criminal cases.

D. The Demise of Federal Habeas Corpus Class Actions

In a novel strategy to remedy systemic criminal procedure violations, courts did for a time certify class actions in federal habeas corpus beginning in the late 1960s.[109] Their rise and recent decline went almost completely unnoticed.[110] The untold story of the habeas corpus class action's demise illuminates what the criminal system would look like if there was a role for aggregation to permit vindication of patterns of constitutional violations. Habeas corpus could be uniquely suited to such class action aggregation. Though it is considered a civil remedy, it permits an appellant to collaterally challenge a criminal conviction.[111] Habeas corpus class action representatives sought to litigate common issues on claims that criminal convictions were unconstitutional or violated federal

---

108. Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201 (2005).

109. *See* HERTZ & LIEBMAN, *supra* note 60, at § 11.4(b); Rules Governing § 2254 Cases, Rule 2(d), 28 U.S.C.A. foll. § 2254. For early cases considering the issue, *see* Adderly v. Wainwright, 58 F.R.D. 389, 404 (M.D. Fla. 1972) ("[I]t is entirely proper, if not wholly necessary, in a case such as this for a court to allow a petition for writ of habeas corpus to proceed upon an appropriate determination in aeeordance with Rule 23 of the Federal Rules of Civil Procedure."); Mitchell v. Schoonfield, 285 F.Supp. 728 (D. Md. 1968); and Hill v. Nelson, 272 F.Supp. 790 (N.D. Cal. 1967). Also available is the procedure of joining petitions, including for discovery or for a hearing, but not for disposition. *See* HERTZ & LIEBMAN, *supra* note 60, at § 11.4(b). Additional elass actions are not habeas challenges to convictions, but really Section 1983 elass actions challenging conditions of confinement and the like. *See id.* at §§ 7.2(c), 9.1, 11.4(b), 41.2.

110. The only treatment of aggregation of eriminal appeals is discussion of habeas corpus class actions in an overview in James Liebman and Randy Hertz's habeas corpus treatise, and a student note written in 1968 describing the then-new phenomenon the year after the first habeas class action was brought. *See* HERTZ & LIEBMAN, *supra* note 60, at § 11.4(b); Note, *Multiparty Federal Habeas Corpus*, 81 HARV. L. REV. 1482 (1968).

111. *See* Schlup v. Delo, 513 U.S. 298, 319 (1995) ("[H]abeas corpus is, at its eore, an equitable remedy."); Fay v. Noia, 372 U.S. 391, 438 (1963) ("[H]abeas corpus has traditionally been regarded as governed by equitable principles."); Riddle v. Dyche, 262 U.S. 333, 336 (1923) ("[H]abeas corpus is . . . an independent civil suit."); *see also* HERTZ & LIEBMAN, *supra* note 60, at § 2.2. There is a natural connection running from habeas corpus to aggregation and civil class actions which arose also out of practices in equity courts. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 832 (1999); *see also* Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269 (1991).

law.[112] Groups of prisoners raised issues such as access to counsel in capital cases, access to legal materials, disparate sentences for juveniles, and the constitutionality of the death penalty.[113] For a time those actions enjoyed some occasional success, but in the late 1990s, the habeas corpus class action met its procedural end.

1. A Tale of Two Habeas Class Actions

Brought a decade apart, two Supreme Court decisions dismissing habeas corpus class actions regarding representation of capital defendants show the promise and then the end of the habeas corpus class action. The more recent of two habeas corpus class actions that reached the Court, *Calderon v. Ashmus*,[114] was brought in California in 1996 to settle a statutory question important to death row inmates. Congress had legislated that "opt-in" states providing competent counsel to capital defendants could impose a 180-day limitations period to file a habeas petition, rather than the typical one-year period.[115] For obvious reasons, death row prisoners wanted to know in advance which limitations period applied to them. A California class sought a declaration that the state did not provide competent counsel to capital defendants and thus that the one year limitations period applied. The district court certified the class and held that California did not meet the conditions for "opt-in."[116] The Court of Appeals and then the Supreme Court reversed. The Court ruled that class members could not obtain advance ruling on issues that were unripe since none had filed a habeas petition yet, and thus, courts had not ruled first

112. Samuel Issacharoff notes the reverse irony that if civil class members could collaterally challenge class litigation, they would have substantial rights unavailable to prisoners during a collateral appeal given the "restrictive development of recent habeas jurisprudence." *See* Issacharoff, *Governance*, *supra* note 44, at 372.

113. Habeas class actions brought by groups in numbers less than twenty are cited below and *infra* notes 116, 118, 123, 138. *See* Cox v. McCarthy, 829 F.2d 800, 804 (9th Cir. 1987) (stating that "[t]his court has held that a class action may lie in habeas corpus"); United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1126-27 (2d Cir. 1974) (finding habeas class action appropriate in challenge by juvenile detainees to sentencing imposed in excess of what adults would receive); Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973) (concluding habeas class action may be appropriate); Mead v. Parker, 464 F.2d 1108 (9th Cir. 1972) (holding in regards to the twenty-seven inmates who filed a habeas class action regarding access to legal materials that "the relief sought can be of immediate benefit to a large and amorphous group"); Knapp v. Cardwell, 513 F.Supp 4 (D. Ariz. 1980) (ruling on class challenge to capital sentencing statute); Jackson v. Justices, 423 F.Supp. 50 (D. Mass. 1976) (staying proceedings against putative class of juveniles indicted after complaints were dismissed); Adderly v. Wainwright, 58 F.R.D. 389, 405 (M.D. Fla. 1972) (certifying and granting relief to class action of Florida capital prisoners challenging death penalty as cruel and unusual punishment).

114. 523 U.S. 740 (1998).

115. 42 U.S.C. § 2261 (2000).

116. Ashmus v. Calderon, 935 F.Supp. 1048, 1056 (N.D. Cal. 1996) (finding certification of a mandatory class appropriate in case on behalf of all California capital prisoners, challenging California's failure to provide competent capital counsel).

whether each of the class members had properly exhausted all of their claims in the state courts.[117]

Justice Breyer dissented in *Ashmus*, emphasizing that aggregation serves important purposes in our system of justice. He explained that the declaratory relief sought would provide a "relatively expeditious judicial answer" to the limitations question and would avoid disarray where prisoners might otherwise file premature (or late) petitions. Justice Breyer's dissent has great force. The Court encouraged needless confusion and motion practice among hundreds of petitioners in the district courts,[118] and refused to decide a discrete question that would "provide legal guidance for others."[119] The Court required a court to do the impossible before certifying a habeas corpus class action—undertake decisions regarding complex individual procedural questions before reaching any common issues to the group. The result meant the end of the habeas corpus class action.[120]

The Court's decision in *Ashmus* provided a mirror image to its decision ten years earlier in *Murray v. Giarratano*,[121] in which the Court reached the merits of a class action on a similar issue. In *Giarratano*, a class of all Virginia death row inmates contended they were constitutionally entitled to counsel for state post-conviction proceedings, particularly the mentally disabled class members who could not represent themselves.[122] The District Court certified the class, found such a right, and the Fourth Circuit affirmed.[123] While the plaintiff inmates in *Giarratano* had not yet brought collateral proceedings in state court, the Supreme Court did not discuss, as it did in *Ashmus*, the propriety of reaching a

117. The Court stated: "[I]f respondent Ashmus is allowed to maintain the present action, he would obtain a declaration as to the applicable statute of limitations in a federal habeas action without ever having shown that he has exhausted state remedies." Calderon v. Ashmus, 523 U.S. 740, 748 (1998).

118. The Third Circuit ruled differently when a class of Pennsylvania capital prisoners filed a habeas class action seeking a declaration to clarify that the state had not provided competent counsel, and thus that they should be able to take advantage of the one-year limitations period. *See* Death Row Prisoners of Pa. v. Ridge, 948 F.Supp 1258, 1263 (3d Cir. 1996). The Third Circuit agreed that an advance ruling on the issue would be desirable and in response the Commonwealth of Pennsylvania conceded it did not qualify as an "opt-in" state. *Id.*

119. 523 U.S. at 750 (Breyer, J., dissenting).

120. *See* discussion *infra* Part I.D.2.

121. 492 U.S. 1 (1989).

122. The district court certified a class of "all persons, now and in the future, sentenced to death in Virginia, whose sentences have been or are subsequently affirmed by the Virginia Supreme Court" and who could not afford and did not have counsel post-conviction. *Id.* at 4. The court stylized the action as a Section 1983 class action, but like in *Ashmus* the court sought to clarify issues regarding post-conviction appeals.

123. Giarratano v. Murray, 668 F.Supp. 511, 512 (E.D. Va. 1986), *aff'd en banc*, 847 F.2d 1118 (4th Cir. 1988).

constitutional issue. Instead the Court reached the merits and found no right to counsel post-conviction.[124]

The Court's decision in *Giarratano* in two other senses did vindicate rights of the class. First, Justice Kennedy's concurring opinion providing the fifth vote, and joined by Justice O'Connor, indicated a more flexible approach that stated whether a right to counsel attached might be a different question if someone were to be executed without a lawyer, and noting that Virginia's system provided "'institutional lawyers to assist in preparing petitions for postconviction relief.'"[125] In response, Virginia began appointing attorneys for habeas corpus appeals in capital cases—thus, the suit did accomplish one goal.[126]

Second, there is a far deeper irony of the *Murray v. Giarratano* class action lawsuit that has only recently risen to the surface. The suit was brought *pro se* as a class action by death row inmate Joe Giarratano, a "jailhouse lawyer," as a class action, largely because of his concern for a fellow inmate, Earl Washington Jr., who could not bring a case himself because he had "an IQ of 69, an execution date three weeks away, and no lawyer."[127] As it turned out, Giarrantano's class action did succeed in obtaining representation for Washington, by drawing the attention of a large New York law firm to work on Washington's case *pro bono.*[128] The firm succeeded in obtaining a stay, although Washington came within nine days of execution.[129] As we now know, Earl Washington was actually innocent of the rape and murder charges of which he was convicted. Eighteen years later, the Governor pardoned him based on DNA testing of evidence from the victim that did not match Washington, but rather matched a man in the state's DNA database.[130] What has also emerged since is that the Virginia Crime Laboratory had both in 1994 and later in 2002, according to outside experts, falsified evidence to imply that Washington could still be guilty.[131] This "enormous botched job," led to ongoing audits of the crime lab; one such audit so far has led to DNA exonerations of two other prisoners who spent a combined thirty-one years in prison for crimes that they did not commit.[132]

---

124. Murray v. Giarratano, 492 U.S. 1, 7-10 (1989). The Court earlier held that the right to counsel is limited to the direct appeal. Ross v. Moffitt, 417 U.S. 600, 610 (1974).

125. Eric M. Freedman, Giarratano *is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 (2006) (citation omitted); *see Giarratano*, 492 U.S. at 14-15 (Kennedy, J., concurring).

126. *See* MARGARET EDDS, AN EXPENDABLE MAN, THE NEAR-EXECUTION OF EARL WASHINGTON, JR. 93 (2003).

127. *Id.* at 83.

128. *Id.*

129. *Id.* at 83, 92.

130. *Id.* at 166, 169-76, 186-87, 193-95.

131. *See* Laura LaFay, *Reasonable Doubt*, STYLE WKLY., July 6, 2005, at 2, 7-8.

132. *Id.*; *see* Michael D. Shear & Jamie Stockwell, *DNA Tests Exonerate 2 Former Prisoners; Va. Governor Orders Broad Case Review*, WASH. POST, Dec. 15, 2005, at A1 (Governor Mark Warner

Aggregation may be no boon for criminal defendants; after all, the *Giarratano* class action resulted in the Court's ruling that capital defendants may lack rights to post-conviction counsel. On the other hand, only by using an aggregate mechanism, the class action, could Giarrantano obtain representation for Washington, who could not represent himself. That representation had system-wide consequences, resulting in not just legal representation but also the exoneration of an innocent man, then raising deep institutional questions about our criminal justice system, including coercive fabrication of a confession by a mentally disabled man and outright forensic fraud by a leading crime lab. Aggregation may also achieve significant judicial economy goals regardless of whether appellants prevail. As Justice Breyer notes in his *Ashmus* dissent, courts may use aggregation to resolve economically alike claims that otherwise might be impracticable to remedy. Yet the Court in *Ashmus* seemed to effectively bar habeas corpus class actions.

2. *Why Habeas Class Actions Vanished*

The Supreme Court's decision in *Ashmus*, based on an individualized conception of criminal procedure, together with the AEDPA and additional procedural hurdles developed by the Court, hastened the end of habeas corpus class action litigation.[133] While the Court never formally ruled whether a habeas corpus class action could be maintained,[134] the Court held in *Ashmus* that a petitioner cannot obtain advance ruling on common issues without having a court rule first whether all class members properly exhausted their individual claims in state courts.[135] The Supreme Court thus requires lower courts to enter a "maze of procedural barriers" at the outset of each individual habeas corpus petition before they may reach issues common to the class.[136]

The Court's ruling making the habeas corpus class action all but impossible seems misplaced and unduly burdens lower courts, states, and

---

pardoned two men, one who served twenty-one years for a rape and another who served eleven years for an assault, after a retesting of thirty-one cases; the Governor ordered that the retesting be expanded to 660 boxes of case files).

133. *See* Rose v. Lundy, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b)-(c) (2000).

134. *See* Middendorf v. Henry, 425 U.S. 25, 30 (1976) ("Because of our disposition of this case on the merits, we have no occasion to reach the question of whether Fed. Rule of Civ. Proc. 23, providing for class actions, is applicable to petitions for habeas corpus."); Harris v. Nelson, 394 U.S. 286, 294 n.5 (1969) ("The applicability to habeas corpus of the rules concerning joinder and class actions has engendered considerable debate."); *see also* Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979).

135. *See* Calderon v. Ashmus, 523 U.S. 740, 747-48 (1998).

136. Reinhardt, *supra* note 85, at 319 ("[Courts] cannot even reach what is now usually the easier question: whether the defendant was deprived of his constitutional rights."). The AEDPA provides petitions may be dismissed on the merits even if unexhausted. *See* 28 U.S.C.A. § 2254(b)(2) (2000); HERTZ & LIEBMAN, *supra* note 60, at § 23.1. Some federal courts have proceeded by "simply ignoring" the Court's statements that procedural defenses "ordinarily should be" considered before the merits. *See* HERTZ & LIEBMAN, *supra* note 60, at § 22.1 & n.31.

petitioners. The Court could have ratified the innovations of lower courts that efficiently resolved preliminary issues common to groups of habeas petitions. As Justice Breyer recognized, habeas corpus class actions provided great benefits in the presentation of common factual and legal questions. As the Second Circuit also recognized, class actions could save "considerable expenditure of judicial time and energy."[137] Similarly, the Eighth Circuit noted that habeas corpus class actions reduce caseloads and address "the common claims of a large group of petitioners . . . without endangering the individual rights of the class."[138] A class action may provide the only opportunity for representation, given no constitutional right to counsel during habeas corpus and the fact that most prisoners proceed *pro se*.[139]

Yet the Court did not discuss a separate and valid reason why habeas corpus class actions can no longer be brought (though it may have been a background concern). That is preclusion, which creates a far harsher procedural barrier to habeas corpus class actions. In the 1990s, the Court and then Congress with the AEDPA imposed strict limitations on raising the same or different issues in a second or successive habeas petition.[140] That preclusion rule might not only prevent class members from maintaining subsequent individual challenges as to the same legal issue,[141] but could also prevent any subsequent relief at all, even as to issues not raised in the class action,[142] and perhaps even if an opt-out is provided.[143] While no court has considered the impact of the AEDPA's successive petition limitation for a habeas corpus class action, the harsh rule provides good reason why none have been brought since *Ashmus* was decided. A class action might preclude criminal defendants who lack individual representation from ever later bringing an individual petition.[144]

---

137. United States *ex rel.* Sero v. Preiser, 506 F.2d 1115, 1126 (2d Cir. 1974).

138. Williams v. Richardson, 481 F.2d 358, 361 (8th Cir. 1973).

139. *See Preiser*, 506 F.2d at 1126 ("because many of those serving reformatory sentences are likely to be illiterate or poorly educated, and since most would not have the benefit of counsel to prepare habeas corpus petitions, it is not improbable that more than a few would otherwise never receive the relief here sought on their behalf"); Adderly v. Wainwright, 58 F.R.D. 389, 405 (M.D. Fla. 1972) (habeas class actions may "make meaningful that which otherwise may be only so many words: the availability of a federal forum").

140. *See* 28 U.S.C. § 2244(a), (3)(A) (2000); McCleskey v. Zant, 499 U.S. 467 (1991); HERTZ & LIEBMAN, *supra* note 60, at §11.4(b).

141. *See* Funchess v. Wainwright, 772 F.2d 683, 688 (5th Cir. 1977) (holding that petitioner was bound by the Florida Supreme Court's decision in a prior class action brought on behalf of all Florida death row inmates challenging use of *ex parte* materials).

142. In such circumstances class adjudication might "substantially impair or impede" the rights of class members. FED. R. CIV. P. 23(b)(3).

143. *See* Brewer v. Swinson, 837 F.2d 802, 804 (8th Cir. 1988) (permitting class member to withdraw from action challenging parole guidelines to pursue own case).

144. I discuss in Part II how aggregation could still reach common questions raised post-conviction in the absence of a harsh preclusion rule. Further, even within the AEDPA's confines, courts could still use consolidation.

Thus, the Court adopted a highly individualized conception of criminal adjudication which, together with the statutory obstacles, made habeas corpus class actions impossible to bring despite the substantial benefits of permitting vindication of systemic criminal procedure problems. The lower courts have now successfully developed new forms of aggregation that seek to permit the same vindication of systemic violations of criminal procedure rights, and in doing so, have redefined conceptions of a criminal law day in court, aggregation, and due process.

II
CRIMINAL LAW AGGREGATION: FIVE CASE STUDIES

The Supreme Court drew a line in the sand. The Court reiterated in its rulings regarding criminal procedure rights and sentencing guidelines that criminal defendants retain a strict individual right to a day in court regarding proof of elements of a crime. Regarding such questions of guilt or innocence, aggregation has no place in criminal law. Further, not only did the Court rule out civil class actions for most criminal procedure rights and all criminal trial rights, but even during collateral appeals, the Court also emphasized individualized treatment of federal habeas corpus petitions to prevent aggregation. The Supreme Court's apparent hard line nevertheless left lower courts room to adopt a range of significant aggregative innovations in criminal cases. Thus, constitutional boundaries on both the civil and criminal sides remain far more practically and conceptually permeable than they appear. I will show how lower courts elide the Supreme Court's central concern to prevent aggregation at trial regarding elements of a crime that must be proven beyond a reasonable doubt. Lower courts instead aggregated criminal cases regarding criminal procedure rights asserted at pre-trial hearings or post-conviction.

These courts aggregate using mechanisms that resemble both class actions and judicial consolidation. They assemble actions like issue class actions regarding common issues relevant to criminal procedure claims. In other respects, the actions resemble the least controversial Rule 23(b)(2) class actions in that they chiefly provide injunctive relief. In addition, some courts avoid some of the procedural concerns of class actions by instead consolidating cases and placing parties before a single court that can then decide common issues or claims.[145] Federal courts[146] and state courts retain inherent power to consolidate cases in specialized proceedings.[147]

---

145. *See* discussion of FED. R. CIV. P. 42(a) and civil consolidation *supra* Part I.C.

146. In federal courts, case management remains within equitable discretion and "inherent power," "to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants." United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) (emphasizing "the power inherent in every court to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants"); *In re* Peterson, 253 U.S. 300, 306-07, 312-14 (1920) (recognizing "inherent

One dramatic difference between the criminal and civil systems is that unlike civil courts of general jurisdiction, state criminal courts that hear only criminal cases are themselves repeat players regarding the very criminal procedure rights that defendants are asserting. Thus, systemic intervention to prevent mass violations of those rights is a form of institutional self-policing. In this Part, I show the breadth of models that lower courts have used to aggregate, presenting below five case studies: four state supreme courts and a federal circuit court that used inherent power to aggregate criminal cases. These courts aggregated to reach a range of problems that otherwise might not be remedied, including: patterns of forensic fraud, inadequate indigent representation, racial disparity in capital sentencing, and summary dismissals of habeas petitions. In each effort, systemic problems were uncovered, detected, tracked, and remedied due to the initiative of courts using aggregation. These innovative procedures suggest that a day in court in criminal law may be more complex than the traditional criminal jury trial model suggests. Last, I will discuss how the federal court wavered, and a second federal court outright failed to aggregate, in both cases illustrating costs of failing to provide an aggregate remedy for a systemic problem. This will connect to the theme of Part III, in which I will argue the Court should embrace such efforts to permit remedies for systemic criminal procedure violations and to reconceptualize its individualized model for criminal adjudication.

Finally, while in civil cases the Federal Rules of Civil Procedure set out requirements for various types of aggregation to protect the due process rights of parties bound; in criminal cases, however, the procedural requirements for aggregation remain murky and untested. I will describe which civil categories each case study suggests, though they are not formally applied, to show that the full range of civil aggregative techniques may be used in criminal law, bringing with them many of the same substantial benefits. In Part III, I examine the ways such actions raise the same due process concerns courts have addressed in civil cases, and will develop a framework for analyzing the procedural and constitutional implications of aggregation in criminal law. I turn now to describing how

---

power" of federal court to appoint auditors, special masters, or commissioners to aid the judge in fact-finding and understanding complex issues).

147. On appeal, federal circuit courts have discretion to consolidate cases before them for joint-decision, when it is efficient, or in the interests of justice. *See* FED. R. APP. P. 3(b)(3); United States v. Washington, 573 F.2d 1121, 1123 (9th Cir. 1978) ("Consolidation under Federal Rule of Appellate Procedure 3(b) may be ordered where the court in its discretion deems it appropriate and in the interests of justice."). Regarding state courts, *see, e.g.*, Sampson v. Sapoznik, 117 Cal. App. 2d 607, 609 (2d Dist. 1953) ("[I]t is a factual question as to whether the questions presented are so related as to make it advisable to consolidate and whether the consideration of the appeals will be expedited by the consolidation. . . .") and Paducah & I.R. Co. v. Albritton, 191 S.W. 879, 880 (Ky. App. 1917) (stating that "appeals may for convenience and the dispatch of business be heard together").

five courts responded to systemic criminal procedure problems with aggregative solutions.

A. West Virginia: Fabrication of Forensic Evidence

The Supreme Court has long held that "a State may not knowingly use false evidence" during criminal proceedings.[148] In the past decade, fabrication of evidence has arisen as a prominent problem, as forensic science laboratory analysts engaged in repeated fraud, perjury, or shoddy work that have caused criminal justice scandals resembling mass tort litigation.[149] In two of the most notorious instances, the misconduct of Joyce Gilchrist in Oklahoma and Fred Zain in West Virginia at their respective crime labs affected hundreds of criminal cases and resulted in judicial exoneration of at least ten prisoners.[150]

In Oklahoma, as early as 1988, a series of state courts found Gilchrist presented misleading if not false evidence, but those courts took no further action to systematically investigate her or the state crime laboratory.[151] In 2001, the Governor finally ordered review of the thousands of cases Gilchrist worked on, but only after six wrongful convictions came to light through DNA testing.[152]

In contrast, the West Virginia criminal justice system formally responded to the Zain misconduct by treating the problem of forensic fraud as a group harm. The state's highest court, the West Virginia Supreme Court of Appeals, convened an extraordinary investigation following what began with a single post-conviction petition for habeas corpus. The court began by appointing the Honorable James O. Holliday, a retired circuit

148. Napue v. Illinois, 360 U.S. 264 (1959).

149. *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 95-99 (summarizing literature on use of "junk science" and describing controversy regarding Montana, Texas, Virginia, and Cleveland crime laboratories); Possley et al., *supra* note 3, at 1, (presenting investigation of 200 death row exonerations since 1986 and finding that more than one quarter involved faulty crime lab work or testimony).

150. Possley et al., *supra* note 3, at 1.

151. *See* Miller v. State, 809 P.2d 1317, 1320 (Okla. Crim. App. 1991) ("Ms. Gilchrist's pretrial forensic report made absolutely no mention of her finding of a 'unique characteristic' concerning appellant's pubic hairs . . . . this significant omission . . . resulted in trial by ambush on a very critical piece of evidence."); Pierce v. State, 786 P.2d 1255, 1261 (Okla. Crim. App. 1990) ("While we cannot take Gilchrist's breach of the law lightly, neither can we find that it was reversible error under the facts of this case."); McCarty v. State, 765 P.2d 1215, 1219 (Okla. Crim. App. 1988) ("Gilchrist's so-called expert opinion was actually a personal opinion beyond the scope of present scientific capabilities."); *see also* Fox v. State, 779 P.2d 562, 571 (Okla. Crim. App. 1989) ("The lack of scientific weight of [Gilchrist's] conclusion is apparent."). Jeffrey Pierce was later exonerated by DNA testing after being wrongly convicted for fifteen years, shedding scientific light on Gilchrist's fraud. Possley et al., *supra* note 3, at 1. Similarly, Robert Miller was later exonerated by DNA testing. *See* Jim Yardley, *Inquiry Focuses on Scientist Employed by Prosecutors*, N.Y. TIMES, May 2, 2001, at A14.

152. *See* Yardley, *supra* note 151, at A14. A federal civil suit seeks damages against Gilchrist and other individuals and municipal entities. *See* Pierce v. Gilchrist, 359 F.3d 1279, 1283-84 (10th Cir. 2004).

judge, to supervise an investigation of the Serology Division at the West Virginia State Police Crime Laboratory.[153] Holliday in turn appointed a team of scientists from the Laboratory Accreditation Board of the American Society of Crime Laboratory Directors (ASCLD), to investigate the policies, procedures, and work of the laboratory,[154] as well as a special prosecutor and the Chief Public Defender to conduct the litigation.[155]

Holliday's report notes that the ASCLD team concluded that fraud by Zain was "the result of systematic practice rather than an occasional inadvertent error."[156] Examining why the crime laboratory did not detect this repeat fraud, the judge found shocking failures, including:

> (1) no written documentation of testing methodology; (2) no written quality assurance program; (3) no written internal or external auditing procedures; (4) no routine proficiency testing of laboratory technicians; (5) no technical review of work product; (6) no written documentation of instrument maintenance and calibration; (7) no written testing procedures manual; (8) failure to follow generally-accepted scientific testing standards with respect to certain tests; (9) inadequate record-keeping; and (10) failure to conduct collateral testing.[157]

The court ordered the West Virginia Division of Public Safety to file with the Clerk of the Court within sixty days a report outlining steps they would take to immediately obtain certification of the State Police forensic laboratory by the ASCLD.[158]

Finally, the court made rulings that would be binding in *all* cases in which evidence by Zain was presented (more than 133), holding that further review was required, and that for efficiency reasons, "in light of the overwhelming evidence, further litigation of whether Trooper Zain's misconduct significantly tainted his participation in numerous criminal prosecutions is unwarranted."[159] Instead, all cases in which Zain's evidence "would have been sufficient to support the verdict" would be reversed, any

---

153. *In re* an Investigation of The W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 502-03 (W. Va. 1993). The Court only did so following settlement with Glen Dale Woodall, who filed a civil suit after being wrongly convicted for five years based on Zain's fabricated evidence; an initial inquiry by the State's insurer; an initial internal audit finding no errors made; and finally, at the request of a county prosecutor. *Id.* at 509-10.

154. *See id.* at 503.

155. *See id.* at 510.

156. *Id.* at 503. The Report cited a separate report by the Laboratory Accreditation Board of the American Society of Crime Laboratory Directors (ASCLD), finding that Zain committed a range of misconduct, from "overstating the strength of results" to misreporting genetic matches, "reporting inconclusive results as conclusive," "repeatedly altering laboratory records," "grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested," "failing to report conflicting results," and "reporting scientifically impossible or improbable results." *Id.*

157. *In re* W. *Va. State Police Crime Lab.*, 438 S.E.2d at 504.

158. *Id.* at 508.

159. *Id.* at 506.

additional DNA testing would be performed by an independent laboratory at the State's expense, and persons who made guilty pleas based on Zain's evidence would also be permitted a chance to withdraw their pleas.[160] Thus, the court-sponsored investigation, involving outside scientific auditors, depositions by prosecutors, and defense counsel, ultimately both lead to group reversals of convictions[161] and structural reform of the crime laboratory.[162] The West Virginia court creatively devised a novel and effective aggregate remedy for what it called a serious "corruption of our legal system."[163]

The saga has not ended. After yet another investigation, this time extending beyond just those that Zain worked on, the West Virginia Supreme Court concluded in 2006 that there was evidence of larger impropriety in the laboratory.[164] While the court did not find intentional misconduct by other serologists, it found errors that were "frequent, recurring and multifaceted, spanning the spectrum of examiners," and that the errors represented "a divergence from good science and on occasion ethical conduct" raising "a strong inference that the problems were systemic in the Serology Division."[165] While not adopting the same presumption as in the cases Zain worked on, the court ruled that all prisoners against whom any West Virginia State Police Crime Laboratory serologist testified are entitled to a "full habeas corpus hearing on the issue of the serology evidence," to representation by counsel at the hearing, and to have the ordinary procedural rules suspended to permit prisoners who had already filed for habeas relief to file a second habeas pctition regarding the serology issue.[166] Thus, the Court provided even more sweeping relief to all prisoners potentially affected by serologists at the laboratory. The court then concluded by noting that though "beyond its purview" the appropriate authorities should carefully consider "removing the Crime Lab from State Police supervision and placing it under an independent agency" with independent supervision and auditing.[167]

The aggregation effectively uncovered, analyzed, and then remedied deep problems at the state crime laboratory, but the court did not discuss the procedural basis for its approach. It is useful to consider whether

160. *Id.* at 506-08.

161. Nine convictions were subsequently reversed. *See* Kit R. Roane & Dan Morrison, *The CSI Effect*, U.S. NEWS & WORLD REP., Apr. 25, 2005, at 48.

162. The investigation initially failed to audit non-Zain cases or investigate whether superiors covered up Zain's fabrications, stating that "[e]vidence regarding whether Zain's supervisors ignored or concealed complaints of his misconduct is conflicting and the issue beyond the scope of this investigation." *See In re* an Investigation of the W. Va. State Police Crime Lab., 438 S.E.2d at 515.

163. *Id.* at 508.

164. *In re* Renewed Investigation of State Police Crime Lab., 633 S.E.2d 762 (W. Va. 2006).

165. *Id.* at 764.

166. *Id.* at 769.

167. *Id.* at 771.

additional rights would have been provided in a civil case. If the court had consolidated the parties before the court, then each of the criminal defendants should have been represented by counsel. Yet the cases of prisoners were not before the court, because they were only identified through the efforts of the expert auditors. [168] Though the group representation resembled a class action, its members had not yet been identified or contacted.[169] Only after the Court concluded the laboratory engaged in fraud did it order that all prisoners potentially affected should be notified of their right to seek relief, including possible reversal of their conviction.[170]

The court's use of group representation resembles a class action—yet not only did the court not provide notice, but the court did not conduct hearings regarding adequacy of representation. One explanation is that during post-conviction review, prisoners lacked an underlying right to *any* counsel.[171] The Supreme Court held that functional "due process concerns" guide when right to counsel attaches during criminal appeals.[172] Perhaps appointment of counsel should be required in aggregate proceedings that affect systemic rights. That reason may explain why the court ensured that the public defender's office was involved and appointed a special master and outside experts. Aggregation may thus have provided superior representation than otherwise available post conviction.

A still better explanation is that the West Virginia Supreme Court of Appeals did not decide the claims of individual petitioners, but rather decided limited common issues on criminal procedure rights that defendants could still assert later in their individual cases. The court carefully ruled only on issues common to the group regarding whether the crime laboratory was corrupt, and left for lower courts whether individual relief should be granted.[173] The court bifurcated the action, as in civil Rule 23(c)(4) issues—only class actions in which common issues are decided but remaining factual or damages issues are tried individually.[174]

The West Virginia court also, in effect, ordered injunctive structural reform of the crime laboratory. The aggregate remedy provided resembles the Rule 23(b)(2) category of "mandatory" class actions without an opt-out

---

168. *Id.* at 510 ("On June 17, 1993, it was determined that the records reflected 133 cases in which Zain had made positive identification of either the suspect or the victim.").

169. *See id.* at 510 ("George Castelle, Chief Public Defender of Kanawha County, was appointed public defender to represent in this investigation prisoners whose convictions might be affected.").

170. *See id.* at 507-08.

171. *See supra* note 147.

172. Halbert v. Michigan, 125 S. Ct. 2582, 2587 (2005). The Court held that states must provide counsel during direct appeals as of right, but not during post-conviction review; the Court functionally examined the purpose of an appeal and whether its purpose is to define criminal procedure rights, or conduct individual review. *See id.* at 2586, 2590.

173. *See* discussion of issues-only class actions *supra* Part I.C.

174. FED. R. CIV. P. 23(c)(4).

right, regarding injunctive relief with respect to the class as a whole.[175] The court's decision regarding whether the crime laboratory was corrupt or not and what procedures should be put into place at the laboratory and in lower courts in effect resolved those questions for the group. Thus, the West Virginia prisoners did not receive any right to opt-out. Civil cases recognize that given a homogenous class, such relief does not adversely affect class members because no individual issues are decided. In Part III, I will expand on why such aggregation satisfies due process, but for present purposes note that the West Virginia Supreme Court of Appeals carefully limited the scope of its aggregation to safeguard the rights of petitioners affected.

B. Louisiana: Ineffective Assistance of Counsel

The Louisiana court used a method of aggregation similar to the West Virginia court's method to address the persistent problem of inadequate indigent defense counsel, but at a different stage—aggregating criminal procedure rights asserted by criminal defendants before trial. Appellants alleging ineffective assistance of counsel normally face the U.S. Supreme Court's difficult to satisfy *Strickland* test, which asks whether the substandard performance of counsel was so prejudicial that, based on the totality of the evidence, it affected the outcome at trial. Under this test, courts need not reach the merits of a claim if they conclude that any potential error by counsel would have been harmless.[176] Rather than apply a post-conviction test that does not effectively address the problem of inadequate counsel, the Louisiana court addressed the problem beforehand in a systemic way separate from the difficult factual questions in individual cases.

The Louisiana court aggregated adequacy of counsel claims in *State v. Peart*.[177] New Orleans resident Leonard Peart was charged in 1993 with murder, armed robbery and aggravated rape among other crimes.[178] His counsel, Richard Teissier, of the Orleans Indigent Defender Program (OIDP), filed a pretrial claim urging the court that, like his colleagues in the OIDP, he could not provide effective assistance of counsel to his clients due to his oppressively large caseload and inadequate resources.[179]

In response, the Chief Judge in the District Court of the Parish of Orleans, Calvin Johnson, treated the problem as a systemic issue. Judge Johnson held a series of consolidated hearings on the defense services

175. FED. R. CIV. P. 23(b)(2).

176. Strickland v. Washington, 466 U.S. 668, 693 (1984).

177. State v. Peart, 621 So. 2d 780 (La. 1993).

178. *Id.* at 784. For additional discussion of the case, see Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005).

179. *Peart*, 621 So.2d at 784.

provided to Peart and other criminal defendants.[180] The court found that Teissier was handling 70 active felony cases and 418 defendants in total.[181] Teissier had no investigator and no funding to hire experts. He had so many clients that they were "routinely incarcerated 30 to 70 days before he [met] with them."[182] Judge Johnson found that "[n]ot even a lawyer with an S on his chest could effectively" handle Teissier's docket.[183] Judge Johnson not only concluded that Teissier could not effectively represent his clients, he also concluded that New Orleans's entire system of indigent defense was unconstitutional. He required the legislature to provide additional funding to hire investigators, support staff, expert witnesses, and attorneys.[184] As a result, Peart received additional resources for his case, resulting in his acquittal on the charges against him in two separate trials.[185]

On appeal, the Supreme Court of Louisiana asked whether it was appropriate for the trial judge to "consolidate motions filed on behalf of multiple defendants charged with unrelated crimes," when the motions all allege ineffective assistance by the same public defender.[186] The court held that consolidated hearings were appropriate to gather evidence efficiently, but that "the true inquiry is whether an *individual* defendant has been provided with reasonably effective assistance."[187] The court ruled that the trial court must "examine each case individually,"[188] but nevertheless agreed with Judge Johnson that indigent criminal defendants in New Orleans received constitutionally inadequate counsel.[189] Using its inherent power to fashion remedies to administer justice, the court established a "rebuttable presumption" that indigent criminal defendants represented by the OIDP lacked effective assistance of counsel. As a result, defendants represented by the OIDP in the future could rely on that presumption, subject to the state's rebuttal, to secure "reasonably effective assistance of counsel" from the trial court.[190] Although it declined to order the legislature

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 789.
184. *Id.* at 784-85.
185. *Peart*, 621 So.2d at 785, 785 n.4.
186. *Id.* at 788.
187. *Id.* at 788 (emphasis in original) ("[N]o general finding by the trial court regarding a given lawyer's handling of other cases, or workload generally, can answer that very specific question as to an individual defendant and the defense being furnished him.").
188. *Id.* at 788-91. The Supreme Court's test for ineffective assistance of counsel asserted post-conviction, for example, requires an individual showing of prejudice. *See* Strickland v. Washington, 466 U.S. 668, 697 (1984). The prejudice test avoids the need for courts to examine systemic inadequacies: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed," because "the entire criminal justice system" should not have to "suffer" the burden of such claims. *Id.*
189. *Peart*, 621 So. 2d at 784.
190. *Id.* at 791.

to take action for separation of powers reasons, the court recommended legislative action. In response the legislature created a state-funded Louisiana Indigent Defense Assistance Board and provided millions of dollars in additional funding.[191]

This chain of events prompted further system-wide legislation and funding, though gross inadequacies persisted over time.[192] The Louisiana Supreme Court recently ruled that prosecutions may be halted if a municipality refuses to make timely indigent defense funding available.[193] Five other state supreme courts have also intervened in individual and consolidated criminal cases to order that states or municipalities provide adequate representation to indigent defendants, with Arizona applying a similar presumption of inadequacy.[194]

The Supreme Court of Louisiana adopted an aggregative procedure in which it decided the common legal and factual issue of the criminal procedure right to effective assistance was decided for the entire Parish of New Orleans. The court also ruled on criminal procedure rights before trial, rather than during post-conviction appeals. Like the West Virginia court, the Louisiana Supreme Court in effect created an issue class action, conducting consolidated hearings for Peart and others represented by attorney Teissier, but then granting relief to all defendants represented by public defenders in the Parish.

---

191. *See* LA. REV. STAT. ANN. § 15:151 (2005) (establishing Louisiana Indigent Defense Assistance Board); State v. Citizen, 898 So. 2d 325, 336 (La. 2005) (discussing the legislature's creation in 2003 of a "blue ribbon" Louisiana Task Force on Indigent Defense Services to study the problem and make reform recommendations); Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?*, 58 LA. L. REV. 389, 398 n.45 (1998) (noting that the legislature increased indigent defense funding by $5 million after the decision in *Peart*, and that two years later, it appropriated another $7.5 million for the same purpose).

192. *See* Stephanos Bibas, *The Psychology of Hindsight and After-The-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 8 (2004) ("Over time, the money failed to keep up with inflation and caseloads, and today New Orleans defense counsel still have heavy caseloads.").

193. *See Citizen*, 898 So. 2d at 339 (establishing procedures to suspend prosecution if no adequately compensated counsel was provided in a timely fashion).

194. *See, e.g.*, State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (holding that if the County of Mohave continued to impose "crushing" cascloads on contract counsel and fail to pay based on the work required in a case, "there will be an inference that the adequacy of representation is adversely affected by the system"); *In re* Order on Prosecution of Criminal Appeals, 561 So. 2d 1130 (Fla. 1990) (ordering "massive" employment of the private bar to handle backlog of thousands of appellate cases in six Florida counties, and stating that if the legislature did not order funds for such counsel, the court would entertain habeas corpus petitions for release pending appeal); State *ex rel.* Stephan v. Smith, 747 P.2d 816, 849-59 (Kan. 1987) (finding that the state of Kansas's system of indigent defense unconstitutional and requiring that the state provide fair compensation to indigent defense counsel); State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 66 (Mo. 1981) (establishing procedures for evaluation and appointment of indigcnt counsel and requiring dismissal of indictment upon motion if no adequate counsel is timely appointed); State v. Lynch, 796 P.2d 1150, 1153 (Okla. 1990) (requiring parity and hourly pay for indigent defenders tied to pay for prosecutors). *But see* Williams v. State, 706 N.E.2d 149, 161 (Ind. 1999) (evidence of systemic inadequacies insufficient to demonstrate individual ineffective assistance). In eontrast, federal courts have abstained from jurisdiction in civil suits regarding indigent representation. *See, e.g.*, Luckey v. Miller, 976 F.2d 673, 679 (11th Cir. 1992).

Like the court in West Virginia, the court in Louisiana also employed a bifurcated approach, in which it addressed the common question of law and fact shared by all defendants separately from individual issues in defendants' cases. The court adopted a presumption that the New Orleans Parish provided ineffective indigent counsel, though in each case a defendant would have to show poor performance.[195] As in West Virginia, this procedure resembled an issues-only or bifurcated civil class action and made it possible to decide common issues without ruling on claims of individual petitioners who lacked representation or participation, and perhaps notice of the aggregate proceedings. Although they lacked representation in the aggregate proceeding, individual defendants could still affirmatively assert the presumption of ineffective counsel later, and the result would depend on the facts of their indigent representation. As discussed in Part III, such novel separation of individual from group issues may solve the due process problem in cases that would otherwise risk unconstitutionality.

C. Connecticut and New Jersey: Race and Proportionality in Capital Sentencing

1. Connecticut

The Supreme Court of Connecticut faced a complex "public law" dispute—five cases in which death row prisoners brought proportionality challenges alleging racial disparity in Connecticut's system of capital sentencing.[196] Under the U.S. Supreme Court's decision in *Gregg v. Georgia*, a state supreme court must consider whether a "sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[197] The court employed an aggregative procedure to address the allegations of racial disparity.

The state Office of the Public Defender had collected data on race in capital sentencing and retained an expert to analyze the data and prepare a report.[198] In response to the expert's report and the claims raised by five death row prisoners, the court ordered that the racial discrimination claims be consolidated "before the same habeas judge and in the same general, consolidated hearing, on behalf of all defendants who have been sentenced to death."[199] The court cited fairness and efficiency concerns mirroring those in class actions cases, stating that consolidation was appropriate given "judicial economy, as well as fairness to both defendants and the

195. *See supra* Part II.B.1.

196. State v. Webb, 280 A.2d 147 (1996). *See infra* notes 198-202.

197. *See* 428 U.S. 153, 167 (1976).

198. *See* State v. Reynolds, 836 A.2d 224, 376-86 (Conn. 2003); State v. Breton, 824 A.2d 778, 824 (Conn. 2003); State v. Cobb, 743 A.2d 1, 499 & n.105 (Conn. 1999).

199. *Reynolds*, 836 A.2d at 233.

state"[200] so that the questions raised could be "resolved at the trial level in one proceeding, rather than several."[201]

The court undertook a "court supervised statistical analysis of [Connecticut's] capital sentencing scheme, from intake to disposition," itself a noteworthy enterprise.[202] Because preliminary data indicated substantial racial disparity, two justices concluded that the system might well be "fundamentally flawed."[203] The Supreme Court then appointed former Chief Justice Robert Callahan as a special master to oversee the consolidated proportionality litigation.[204] Thus, a respected and experienced judge now supervises the consolidated proceedings. The Connecticut procedure resembles civil consolidation, in which cases are joined for hearings and decisions on common issues.[205] The litigation is still pending.[206] The New Jersey example discussed next illustrates a still more elaborated form of consolidation in which courts placed capital cases before a special master.

2. New Jersey

The New Jersey Supreme Court initially adopted procedures similar to those adopted in Connecticut after a capital defendant raised a claim alleging lack of proportionality and racial disparity in death sentencing.[207] The court found insufficient evidence to support the defendant's claim but ordered further examination.[208] It appointed a retired judge as special master to investigate the claim. The court also appointed a sitting judge as a second special master to study the problem and review additional data from the Administrative Office of the Courts.[209] The court next ruled that it would consolidate all additional capital cases raising race discrimination claims, making clear that its ruling would be binding on all pending capital

200. *Id.*

201. *Id.* at 234.

202. State v. Ross, 863 A.2d 654, 676 n.3 (Conn. 2005) (Norcott, J., concurring).

203. *Id.* at 677 (Dranginis, J., concurring).

204. *Id.*

205. *See supra* note 24 and accompanying text.

206. *Id.* at 582 n.4 (litigation was pending as of January 2005). *See also* Death Penalty Act. 2001 Conn. Acts 151 (Reg. Sess.), § 4(a) (convening a commission to study the death penalty in Connecticut); Anna-Lisa Joseloff, Note, *Connecticut's Capital Punishment Scheme: Still Tinkering With The Machinery Of Death*, 23 Q. L. REV. 889 (2004).

207. State v. Loftin, 724 A.2d 129, 154 (N.J. 1999).

208. *See id.* In 1996, the Court appointed retired Superior Court Judge Richard S. Cohen as Special Master to "conduct a review, perform analyses, and make findings and recommendations relating to defendants' race as a possible factor in the decision of juries to impose the death penalty." *Id.* Dr. John Tukey, Professor Emeritus of Statistics at Princeton University, served as technical consultant to Judge Cohen. *Id.* The Court agreed with the Special Master's conclusion that the data did not conclusively show race discrimination but that further study was warranted. *Id.* at 154-56.

209. *In re* Proportionality Review Project, 735 A.2d 528, 532-33 (N.J. 1999); *see also In re* Proportionality Review Project II, 757 A.2d 168 (N.J. 2000); DAVID S. BAIME, REPORT TO THE NEW JERSEY SUPREME COURT: SYSTEMIC PROPORTIONALITY REVIEW PROJECT (1999).

cases in the state. It later ruled that as data analysis was updated annually, the court would rule separately on the merits of that year's cases.[210]

After reviewing more comprehensive data, the Special Master decided that review should extend to death-eligible cases in which prosecutors chose not to seek the death penalty.[211] The Special Master made a series of recommendations which the court adopted, resulting in a new system of proportionality review for capital cases in the state, a permanent special master to conduct ongoing data collection about all death-eligible cases, and reform of the sub-categories a jury considers in finding aggravating or mitigating factors.[212] Thus, the New Jersey Supreme Court not only recognized a problem with its capital sentencing system, and not only analyzed data and applied a solution, but developed and incorporated new models and new analysis.[213] The court convened an ongoing project to refine capital sentencing and improve proportionality by pooling data and conducting statistical analysis.[214]

The New Jersey court used a method similar to civil law consolidation to resolve common issues in a group of capital cases and review aggregate data. Further, the court not only sought to provide a remedy to all pending cases, but set up an institution designed to pursue ongoing structural reform of its capital sentencing system.[215]

D. The Second and Tenth Circuits: Partial and Failed Aggregation

Each of the prior case studies involved a different systemic constitutional criminal procedure violation—fabrication of forensic evidence, ineffective assistance of counsel, and racial discrimination. The final case study, set in the Second Circuit, focuses less on the criminal procedure problems involved (cursory appellate review) than on the unsatisfying scope of the aggregation. I also include a case study not of

---

210. *See In re Proportionality Review Project*, 735 A.2d at 543-44; In re Proportionality Review Project II, 757 A.2d at 226.

211. *In re Proptionality Review Project*, 735 A.2d at 533-34.

212. *Id.*

213. The New Jersey Supreme Court recently appointed a retired judge as Special Master in a new aggregative review of consolidated cases in *State v. Chun et al.*, 2006 WL 3858446 (N.J.) (describing updated stay procedures), to hear expert evidence regarding scientific reliability of "Alcotest 7110," an infrared device New Jersey law enforcement adopted to replace the Breathalyzer. *See* Charles Toutant, *N.J. Supreme Court to Determine Reliability of DUI Testing Device*, N.J. L.J., Dec. 19, 2005. Drunk driving prosecutions were stayed pending rulings regarding allegations of erroneous readings; the Court's ruling may "end the gridlock" concerning the device's scientific reliability. *Id.*

214. *In re Proportionality Review Project II*, 757 A.2d at 172, 226.

215. This novel judicial scheme continues although the legislature has suspended the death penalty in New Jersey citing fairness concerns. Act of Jan. 12, 2006, 2005 N.J. Laws ch. 321, § 3, *available at* http://www.njleg.state.nj.us/2004/Bills/PL05/321_.PDF; Judiciary New Release, Supreme Court Accepts Death Penalty Report, Oct. 13, 2006, *available at* http://www.judiciary.state.nj.us/pressrel/PR101306a.pdf.

aggregation, but of failure to aggregate by the Tenth Circuit, despite its unique position to address persistent problems in the criminal system. The Second Circuit's incomplete aggregation and the Tenth Circuit's failure to aggregate provide contrasts regarding the value courts place on economy, federalism, and individual rights.

An aggregation of habeas corpus petitions led to a unique and controversial interchange between the Second Circuit Court of Appeals and the Eastern District of New York. The Second Circuit consolidated sixteen unrelated habeas corpus petitions on appeal, because they raised a common issue of law. Each of the petitions was summarily dismissed without any written explanation of the grounds by district court Judges David G. Trager and Edward R. Korman. The circuit initially held that such dismissals were impermissibly opaque and not "sufficiently informative to permit meaningful appellate review."[216]

Judge Trager wrote to the circuit and explained that he would deny a petition summarily if it "clearly appear[ed] to have no merit," based on a "thorough review," and would not write his reasons, but instead would cite to the state appellate court's decision and prosecutor's papers.[217]

It was the Second Circuit that blinked. In an amended decision, the circuit reversed course and held that individual issues involved in the petitions warranted "particularized" attention such that its prior consolidation served "no useful purpose."[218] Upon individualized review, the court found that additional specificity from the lower court was required on remand in only in two of the sixteen cases, and held as to the others that the petitioners did not show substantial deprivation of a constitutional right.[219]

The back and forth between the Second Circuit and the Eastern District of New York illustrates the ongoing judicial discomfort with adopting aggregation in the criminal context. In undoing its former consolidation of sixteen habeas corpus petitions, the circuit raised, but did not develop, the questions of legitimacy and individualized justice that arise when courts consolidate cases that appear to present common issues of law. The Second Circuit seemed conflicted, desiring to avoid the appearance of also engaging in summary justice, yet seeking to remedy summary dismissals that imposed the cost of interpreting reasoning without

---

216. Rudenko v. Costello, 286 F.3d 51, 64 (2d Cir. 2002).

217. *Id.* at 61 (The practice Judge Trager followed since Spring 1999 was to "personally review" the record and "[i]f the case clearly appears to have no merit, I deny the petition summarily based upon my own personal and thorough review of the relevant parts of the record. Normally, when I do so I rely either on the opinion of the Appellate Division, if it contains a discussion of the relevant issue, or upon the discussion contained in the memorandum of law filed by the District Attorney or both."). Judge Trager added; "[W]hcn I believe the case warrants it, I write a thorough, detailed opinion explaining my reasons for denying the writ." *Id.*

218. Rudenko v. Costello, 322 F.3d 168, 170 (2d Cir. 2003).

219. *See id.*

written guidance from the lower court on appellate courts. The decision suggests that aggregative reform must look to costs imposed on the court system as a whole.

An example from the Tenth Circuit illustrates the systemic cost of the failure to aggregate. The Tenth Circuit faced a series of habeas corpus appeals raising extreme prosecutorial misconduct by Oklahoma County District Attorney Robert H. Macy (the prosecutor who repeatedly introduced evidence that forensic criminologist Joyce Gilchrist fabricated) in death penalty cases.[220] In capital case after capital case, Macy uttered litanies of prejudicial remarks to the jury,[221] mocked the defendant, misstated the law and referred to evidence not in the record,[222] introduced surprise theories at trial,[223] compared a defendant to Charles Manson,[224] and engaged in misconduct that was both "juvenile" and "intentional and calculated."[225] One Tenth Circuit decision and one state court decision reversed a conviction based on Macy's misconduct, but that did not solve the problem.[226] In case after case, the Tenth Circuit found "overwhelming evidence" of guilt such that Macy's repeated misconduct was harmless error.[227] Oklahoma appellate courts responded similarly;[228] however, one judge despaired that "[t]his Court has let this flagrant disregard of our rulings pass too long."[229] Tenth Circuit Judge Robert H. Henry in 2002 wrote separately in 2002 to "voice . . . concern" with misconduct "over the last fifteen years,"[230] and noting that "in spite of the absence of such prejudice in individual cases, at some point the repeated violation of ethical responsibility threatens the foundations of our justice system."[231]

The Tenth Circuit could have employed aggregation to deal with repeated prosecutorial misconduct in a variety of ways. Aggregation in this context might have meant ruling a presumption existed, based on a ruling that Macy's behavior violated the constitution, but referring to the lower courts the question whether individual relief should be granted. The Court could have simply referred Macy to a state disciplinary committee regarding the repeated instances of misconduct based on his pattern of

220. *See supra* notes 151-153.

221. *See* Trice v. Ward, 196 F.3d 1151, 1166-67 (10th Cir.1999).

222. *See* Le v. Mullin, 311 F.3d 1002, 1013-24 (10th Cir. 2002).

223. *See* Miller v. Mullin, 354 F.3d 1288, 1296 (10th Cir. 2004).

224. *See* Moore v. Gibson, 195 F.3d 1152, 1172-73 (10th Cir. 1999).

225. Duckett v. Mullin, 306 F.3d 982, 994 (10th Cir. 2002).

226. *See* Paxton v. Ward, 199 F.3d 1197, 1216, 1218 (10th Cir. 1999); McCarty v. Oklahoma, 765 P.2d 1215, 1221 (Okla. Crim. App. 1988) (reversing a conviction and remanding for a new trial).

227. *Le*, 311 F.3d at 1019; *Trice*, 196 F.3d at 1067-68.

228. For state court cases similarly finding misconduct by Macy to be harmless error in light of overwhelming evidence of guilt, *see* Hooks v. Oklahoma, 19 P.3d 294, 314 (Okla. Crim. App. 2001); Duckett v. Oklahoma, 919 P.2d 7, 19 (Okla. Crim. App. 1995).

229. *Hooks*, 19 P.3d at 314 n.51.

230. *Le*, 311 F.3d at 1029-30 (Henry, J., concurring).

231. *Id.* at 1030.

behavior. Short of aggregating cases, the court could have provided declaratory relief, stating that Macy's behavior was unconstitutional, though denying individual relief. Instead, the Tenth Circuit failed to separate the issue of systemic misconduct from individual harmless error, and thus permitted Macy and other prosecutors to "cynically test the bounds of the harmless-error doctrine.[232] As a result of its myopic failure to view the problem as systemic, the public suffered fifteen years of misconduct from Macy and his office.

Both the Tenth Circuit and (to a lesser degree) the Second Circuit were unwilling to engage in a judicial self-help by consolidating cases on appeal in order to review and remedy repeat error. In both cases, aggregation on appeal raised no due process concerns. No potential problems of nonparty preclusion discouraged aggregation; all affected defendants were parties and all sought relief as against the State. Nevertheless, the courts exhibited strong institutional reluctance to aggregate, a reluctance grounded in an individualized, and I argue misplaced, conception of the criminal process. In both cases, this reluctance had significant systemic costs, in the form of either cursory review or prosecutorial misconduct.

III
MODELS FOR AGGREGATION AND INSTITUTIONAL REFORM IN CRIMINAL LAW

Justice Scalia, commenting in *Herrera v. Collins* on whether the Constitution permits a court to execute an innocent person, stated that "[w]ith any luck, we shall avoid ever having to face this embarrassing question again," and added that the Court should therefore not saddle lower courts with the need to examine "routine and even repetitive" questions about prisoners' innocence.[233] Aggregation in criminal law, adopted by lower courts in unusual situations involving systemic criminal procedural violations, suggests that courts face a fork in the road. Courts can aggregate to summarily dispose of the routine and repetitive cases overloading their criminal dockets without the full complement of due process protections drawn from civil law that I frame below. Or they can instead develop ways to ask "embarrassing" questions about criminal procedure violations or even questions about prisoners' innocence, using aggregation to sort out miscarriages of justice from the "routine and repetitive." Each of the state courts discussed in Part II reacted against the routine and repetitive individualized approach to criminal law, and instead used aggregation to develop group solutions for criminal justice problems.

232. Duckett v. Mullin, 306 F.3d 982, 994 (10th Cir. 2002).
233. Herrera v. Collins, 506 U.S. 390, 428 (1993) (Scalia, J., concurring).

On the other hand, many courts, like the Second and Tenth Circuits, may be understandably reluctant to experiment with novel aggregative techniques, even when confronted with systemic error. Counsel may not often seek aggregative solutions, not having considered such approaches. Courts may shy away from aggregative approaches out of a reluctance to intrude on law enforcement. Courts may also understandably fear the uncharted terrain of aggregation in criminal law and the very real due process dangers of binding entire groups of criminal defendants. The next sections provide guidance in response to such important practical and constitutional concerns. I develop a due process framework to address when aggregative procedures may be used in criminal law. I argue that lower courts should embrace this framework when they find aggregation in criminal law appropriate. Further, I argue that based on this framework, the Supreme Court should if given the opportunity recognize and approve the aggregative innovations of lower courts as consistent with due process.

Finally, I turn to alternatives to aggregation, recognizing that if courts remain hesitant to aggregate criminal cases regarding criminal procedure rights, other forms of institutional reform might nevertheless accomplish the goal of remedying systemic criminal procedure violations. Such intermediate models avoid some of the procedural complications of aggregation, but on the other hand, they also lack the benefits of formal judicial enforcement, since they depend instead on informal self-regulation within criminal justice institutions. The examples that I explore are innocence commissions, prosecutorial review, special masters, and substantive two-tier appellate review.

A. A Due Process Framework

At the outset of this Article, I described how an apparently rigid divide between criminal and civil law suggests at first blush that little to no aggregation is possible in criminal law. Based on the strength and formality of the criminal law ideal of the individual day in court, one might expect the rise of aggregation in criminal law to present thorny constitutional questions. Instead, the examples discussed above show that aggregation of criminal cases remains quite feasible. In the shadow of the Supreme Court's decisions, lower courts adopted means of aggregating claims that avoid constitutional right to jury trial concerns. I now provide a framework for analyzing the procedural and constitutional implications of the courts' approaches, which the lower court opinions did not explicitly provide.

I argue that due process rules provide coherent and important boundaries for aggregation in criminal law. Although the approaches discussed in Part II did not overstep due process limits, the courts did not explore why their methods avoided due process violations. Without an

exploration of these reasons, courts might inappropriately extend their models to threaten criminal procedure rights. Under my framework, courts would monitor three critical areas where procedural protections are necessary: (1) preclusion (often requiring bifurcation), (2) adequate representation, and (3) exit rights.

1. Preclusion and Bifurcation

The state courts in each example of aggregation in criminal law discussed in Part II employed a bifurcated structure in which courts limited their decisions to common issues of procedural rights. This bifurcated structure is the result of preclusion rules derived from civil due process law. Such rules provide a due process protection against being bound by litigation in which one was not a party (with class actions as a notable exception).[234] Due process permits two types of preclusion of prior parties: (1) claim preclusion, which prevents relitigation of transactionally related claims, and (2) issue preclusion, which binds a party as to factual and legal issues that the party previously litigated and lost.[235] Below, I discuss how bifurcation prevents both types of preclusion from posing significant due process hurdles to aggregation of criminal cases and explore the potential benefits bifurcation offers defendants. I conclude by examining the limits due process places on bifurcation.

Without bifurcated adjudication, claim preclusion might present an obstacle to class actions in criminal law. Absent bifurcation, class actions might unfairly prevent nonparticipants from raising their individual criminal appeal claims. In Part I, I discussed how the federal habeas corpus class action met its demise after the Supreme Court's ruling in *Ashmus*, partly because the AEDPA's harsh successive petition rule would preclude class members from bringing any subsequent habeas corpus petitions. Criminal class actions are only possible under the Due Process Clause when such harsh procedural roadblocks are relaxed to permit subsequent individual claims to be brought.[236] The West Virginia and Louisiana courts employed bifurcation to avoid procedural hurdles to aggregation by ruling on common questions only and subsequently allowing the separate litigation of individual claims.[237]

---

234. *See* Hansberry v. Lee, 311 U.S. 32, 40-41 (1940); *supra* note 42 and accompanying text regarding class actions.

235. *See* 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402 (2d. ed. 2002) (distinguisbing issue and claim preclusion).

236. Civil class action requirements already ensure that only cases with common issues and those in which class resolution is effieient will be litigated. Notice and an opportunity to opt-out also protect the due proeess rights of those bound by the class action's holding. *See supra* note 42 and accompanying text; FED. R. CIV. P. 23(b)(3), (c)(2).

237. A court could avoid the problem of precluding claims of nonlitigants by ruling on each of the cases individually, resulting in fewer economies but generating some through the use of a common decision maker. *See infra* Part III.B.3.

Whether accomplished through class action or through consolidation, bifurcated aggregation allows courts to achieve economies by deciding only limited issues on a group basis. Aggregate rulings on common mixed questions of law and fact simplify subsequent individual proceedings by taking those common issues off the table. Such aggregate rulings avoid due process problems because they do not bar petitioners from raising separate questions in their individual cases afterwards. For example, a ruling that the state adequately funded indigent defense would not prevent a prisoner from later raising the issue that his lawyer performed inadequately in his specific trial. The prisoner's trial would involve separate events and factual issues, and the prisoner would not have previously litigated the claim regarding his own trial.[238]

In contrast, reduced efficiencies arise from deciding a purely legal issue because any decision in a "test case" would already be binding precedent in future cases. Thus, when Kuwaiti relatives of twelve men indefinitely detained at Guantanamo Bay filed a joint habeas petition requesting access to courts to exonerate themselves, the consolidated petition was appropriate since that legal question could be decided apart from the individual facts of any of the cases; but even if only one detainee had filed an action, the ruling in his case would be binding precedent on that legal issue regardless.[239] The courts described in Part II did not render decisions striking down legal rules or statutes that then affected large numbers of criminal cases, like the Supreme Court did in *Furman v. Georgia* or *Apprendi v. New Jersey,*[240] but instead ruled regarding existing criminal procedure rights and, in particular, regarding mixed questions of law and fact for which efficiencies were gained from consolidated evidentiary hearings to illuminate the systemic nature of the violations. The rulings resembled class actions brought by plaintiffs seeking injunctive relief regarding a pattern of violations.[241]

Issue preclusion rules also explain how courts can consolidate criminal cases and decide common mixed questions of law and fact without raising substantial due process problems. Aggregate judgments did not improperly preclude future prisoners on individual issues that they never litigated. Instead, each decision related to criminal procedure rights that criminal defendants could then affirmatively assert against the State, a

238. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). The court's decision would, however, have a stare decisis effect on any future claims challenging the adequacy of state funding for indigent defense.

239. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 448 (D.D.C. 2005).

240. As noted in *supra* note 68, the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), resulted in the overturning of hundreds of death sentences nationwide. Similarly, the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 508 (2000), affected sentencing in thousands of cases.

241. *See infra* Part III.D regarding whether court-centered aggregation may better remedy criminal procedure violations than civil litigation.

repeat player in all prosecutions. Defendants who do not participate in aggregate litigation can still benefit from favorable decisions if they successfully assert collateral estoppel against the State, extending the reach of the aggregate decision.[242]

When a court decides common issues against a class of prisoners, preclusion rules ensure scant prejudice to those prisoners who did not participate in the litigation. Even if a court decides that a group of criminal defendants cannot reverse their convictions based on a crime lab's pattern of forensic fraud, its ruling, while a precedent with stare decisis effect, would not prevent future criminal defendants from raising a fabrication of evidence claim. That a lab did not systematically fabricate evidence in the past does not mean that it did not do so in an individual case or that it will not systematically do so in the future. As is clear from the Supreme Court's civil class action decisions, due process prevents a court from binding future parties not yet injured or parties who did not have a full and fair opportunity to participate in the prior litigation.[243]

Further, as noted earlier, the system-wide relief that courts granted in their consolidated decisions, resembles the Rule 23(b)(2) injunctive or declaratory relief class action.[244] This civil category recognizes that given a homogenous class without conflicting interests, equitable relief on behalf of a class does not adversely preclude class members.[245] In West Virginia, Connecticut and New Jersey, courts grouped cases together to consider providing state-wide injunctive relief. Intuitively, defendants can only benefit from such aggregation (provided that they have adequate representation, as discussed in the next section).

The combination of the Supreme Court's decisions regarding the constitutional right to a jury trial and due process preclusion rules narrows the range of issues that aggregation can reach in criminal law. This explains the structure of the aggregative schemes described in Part II. Only affirmative rights of defendants, not questions of guilt or elements of the crime, are appropriate for aggregation. Courts cannot prevent individual defendants from asserting rights for which they were not represented in aggregate litigation in subsequent individual cases. This explains why the state courts bifurcated cases to separate individual questions from common group questions of rights violation. Deciding individual defendants' claims would have violated due process.

---

242. Regarding non-mutual offensive use of collateral estoppel, *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Roles are reversed from civil litigation. The criminal defendant in effect acts as a plaintiff asserting constitutional rights. The Double Jeopardy Clause also prevents the State from precluding a defendant based on a prior criminal conviction. *See* U.S. CONST. amend. V.

243. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 n.20, 627 (1997).

244. *See* FED. R. CIV. P. 23(b)(2).

245. *See supra* note 38 and accompanying text.

Criminal defendants therefore may have everything to gain and little to lose from aggregation. However, due process rules mean that aggregation is practicable only in a narrow but important issues-only or bifurcated case. This type of case involves a pattern of violations in which common factual and legal issues affect a group of criminal defendants.

2. *Adequate Representation and Conflicts of Interest*

Courts should engage in special scrutiny of the adequacy of representation in aggregated criminal cases, where common and severe problems of underfunded or inexperienced indigent defense counsel may only be magnified. At the same time, aggregation also has the potential to greatly improve the quality of indigent representation for large groups of defendants. The rules for adequate representation in civil class actions provide courts with a good starting point for this examination.

Inadequate representation is the paramount threat to due process in criminal law aggregation. The stakes for criminal defendants, who face loss of liberty, reputation, and even life, cannot be overstated, even as to criminal procedure rights separate from ultimate questions of guilt or innocence. Despite these high stakes, local governments often provide, and the Supreme Court finds constitutionally adequate, trial counsel who are inexperienced and poorly trained or worse—indifferent, half-asleep or drunk during trial.[246] Such lawyers are barely often compensated for their work, and studies show gross inadequacies in indigent defense funding in many states.[247] In some statewide or county-wide funding schemes counsel receive fixed fees that amount to sub-minimum wages even in capital cases,[248] or fixed-price contracts for an entire county's annual caseload.[249] The fact that adequacy of representation is not examined by courts in the vast majority of cases plea bargained in the shadow of trial only adds to the problem.[250] Aggregation could magnify the harm of inadequate representation in criminal cases.

Aggregation also poses less immediately obvious threats to adequate representation. At first glance, criminal cases do not present self-serving lawyers with any opportunities to strike the "sweetheart" settlement

246. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994) (describing examples of egregiously poor representation that the Supreme Court approved as constitutionally adequate).

247. *See supra* note 96.

248. *See id.*; *see also* Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 300-02 (1991).

249. *See, e.g.*, Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 307 (2002) ("The greatest problems with inadequate defense counsel are created by low-bid fixed-price contracts.").

250. *See* Adam Liptak, *County Says It's Too Poor to Defend the Poor*, N.Y. TIMES, Apr. 15, 2003, at A1 (describing dire reports of indigent defense counsel coercing clients into pleading guilty simply to reduce their overwhelming caseloads).

agreements at the expense of class members that plague civil law class actions.[251] After all, criminal defendants look forward to no economic reward, and counsel do not have any financial stake in the outcome of criminal trials.[252] Nevertheless, the peculiar economics of criminal litigation could result in sweetheart deals of a different breed. Public defenders, prosecutors and judges all have potential motivations to favor settlement at the expense of defendants.

Defense counsel are often under-funded and inexperienced. They may be interested not in winning but only in receiving fixed compensation. They may be unable to competently represent the rights of a group of criminal appellants with respect to specialized procedural or expert scientific issues. Aggregation may further reduce their already reduced incentives to present individualized cases in an overburdened system. If defense lawyers receive higher fees for representing groups, they may pursue aggregation in cases not similarly situated or where conflicts of interest exist. Defense counsel may gear resources toward cases they feel have merit at the expense of aggregated cases—one extreme example was a public defender's office in Nevada that assigned least experienced attorneys to capital cases as a matter of policy, and allocated fewer resources to cases where their client failed a polygraph test.[253] Roberto Miranda, who spent fourteen years on death row until his conviction was vacated based on ineffective assistance of counsel,[254] received a defender who was one year out of law school, never tried a murder case, and interviewed just three of the forty witnesses Miranda told him could prove his innocence.[255] The Ninth Circuit sitting en banc concluded that Miranda could sue the County for policies that, as alleged, all but guaranteed him ineffective assistance.[256] Finally, public defenders are difficult to hold liable for malpractice.[257]

---

251. *See* Hay & Rosenberg, *supra* note 9, at 1377-78 (discussing collusion in civil class action settlements); *see also* sources cited in *supra* note 44.

252. When groups of criminal defendants or appellants are differently situated, courts could adopt the remedy suggested by the Court in *Ortiz* and *Amchem* of dividing subclasses with separate counsel. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997).

253. *Id.*

254. Miranda v. Clark County, 319 F.3d 465, 467-68 (9th Cir. 2003). *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 78-79.

255. *Miranda*, 319 F.3d at 467.

256. *Id.* at 470.

257. *See* Howard H. Chen, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L.J. 783, 810 (1996) (criticizing rulings finding public defenders immune and describing difficult common law standard requiring a showing of prejudiee caused by attorney's breach of duty).

Prosecutors might use aggregation to dispose of cases favorably, or to obtain a "sweetheart" ruling on a criminal procedure issue.[258] Collusive settlement with group-counsel in an aggregate litigation could save the State the burden of relitigating difficult procedural issues in individual cases with more defendant-friendly facts. Indeed, one could imagine a scenario in which the State agrees to withdraw prosecution of a named criminal defendant class-representative in order to secure a beneficial settlement regarding future challenges to criminal procedure violations.

Collusive settlements in which the court approves a mass plea bargain to avoid individual criminal trials or appeals would be possible. In civil law, "trial judges have a personal and professional stake in settling large class actions," and judges have approved vast settlements where underlying liability remained in doubt.[259] Similarly, judges in criminal cases might conduct lax scrutiny of defense counsel and then push group plea bargains just as courts may encourage settlement of complex civil suits.[260] Indeed, the ABA has documented examples in several states where courts make a regular practice of unconstitutionally pressuring indigent defendants to accept plea bargains, sometimes in groups, without having even met defense counsel.[261] Given our perennially overburdened criminal system in which repeat players seek to clear their overloaded dockets, courts may be irresistibly tempted to use aggregation to dispose of cases quickly.

On the other hand, aggregation may greatly improve indigent criminal defense representation. As in civil class actions involving similar small claims of numerous plaintiffs, criminal defendants may share common allegations of criminal procedure violations that no one criminal defendant would have a great chance of prevailing on. Absent aggregation, a defense attorney might not bother to raise a challenge that is unlikely to impact the outcome in his defendant's case. As a group, however, a pattern of possible constitutional violations may suggest the need for a system-wide injunction. For example, in West Virginia aggregation lead to crucial reforms of the state crime laboratory, but only a handful of criminal convictions were reversed.

As in civil cases, far better lawyers might be attracted to aggregate litigation. Criminal defense lawyers might receive additional funding to represent groups in more complex aggregate litigation. If defense attorneys are paid by the case, they might have great incentives to aggregate cases

---

258. *See, e.g.*, Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995) (describing collusive settlement in mass asbestos litigation).

259. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1301 (2002) (describing approval of class settlement in breast implant litigation leading to Dow Corning bankruptcy in which scientific support for claims remained equivocal).

260. *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 721 (E.D.N.Y. 1983) (class certification may "encourage settlement of the litigation").

261. *See* ABA REPORT, *supra* note 96, at 24-25.

and seek out common issues affecting groups of criminal defendants, just as fee shifting rewards a civil rights attorney as a "private attorney general" uncovering public wrongs.[262] Courts might provide funding to compensate defense lawyers for the more difficult work of representing a group, which might attract more skilled lawyers.[263] Large law firms and civil rights organizations might volunteer to handle aggregated cases raising systemic issues.[264]

What is more, group representation would provide some post-conviction indigent appellants, who often have no lawyers at all, with counsel. Except for indigent capital prisoners who have a statutory right to counsel for federal habeas corpus petitions,[265] appellants have no Sixth Amendment right to counsel during post-conviction appeals. Only a "very small fraction" of federal habeas corpus petitioners are represented.[266]

While I suggest that courts should take advantage of the benefits of appointing competent counsel with better resources to handle systemic problems, I also note that courts should be aware that aggregation is double-edged in criminal law with respect to the dangers of inadequate defense representation. Courts should provide heightened scrutiny of adequacy when aggregating criminal cases, just as they do in civil cases.[267] In the context of civil aggregation, the Supreme Court has made clear that due process requires that a non-party class member be "adequately represented by someone with the same interests who is a party" for the class member to be bound by the litigation.[268]

---

262. *See* 42 U.S.C. § 1988 (2000); S. REP. No. 94-1011, at 4-5 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5909-10 (explaining the Senate's intent to shift fees to reward civil rights lawyers acting as a "private attorney general").

263. For a fascinating article conceptualizing civil defendant class actions, and suggesting schemes to reward counsel for representing groups of dispersed defendants, *see* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685 (2005).

264. An example was the role of Paul Weiss in the Earl Washington, Jr. case, discussed in *supra* Part I.D.1. Public interest organizations such as the NAACP Legal Defense and Education Fund also coordinate *pro bono* efforts to remedy systemic criminal justice violations.

265. *See* 21 U.S.C.A. § 848(q)(4)(B) (2006); McFarland v. Scott, 512 U.S. 849, 854-55 (1994).

266. Duncan v. Walker, 533 U.S. 167, 191 (2001) (Breyer, J., dissenting) ("[T]he vast majority of federal habeas petitions are brought without legal representation."); *In re* Habeas Corpus Cases, No. 03-MISC-66 (JBW), 2003 WL 21919833, at *1 (E.D.N.Y. May 1, 2003); ROGER A. HANSON & HENRY W.K. DALEY, FEDERAL HABEAS CORPUS 14 (1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf (finding that 93% of habeas petitioners in study were pro se). *See also* Adderly v. Wainwright, 272 F. Supp. 530, 532 (M.D. Fla. 1967). A Florida federal district court, before certifying a class, ordered interviews with death row inmates to determine whether they would be adequately represented by class counsel. *See* Adderly v. Wainwright, 58 F.R.D. 389 where the court concluded that a class action was appropriate because the petitioners were "functionally illiterate and practically counselless."

267. *See, e.g.*, Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 161 (1982) (noting that a Title VII class action may only be certified "if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied").

268. Martin v. Wilks, 490 U.S. 755, 762 n.2 (1989) (citing Hansberry v. Lee, 311 U.S. 32, 41-42 (194), and FED. R. CIV. P. 23); *see also* Robert G. Bone, *Rethinking the "Day in Court" Ideal and*

Thus far, courts have not considered adequacy of representation issues regarding aggregation in criminal law (except for a time in habeas corpus class actions).[269] Although the rules regarding adequate representation in criminal law aggregation are murky where post-conviction appellants lack a right to counsel, the higher stakes in aggregated criminal cases provide a powerful reason to scrutinize adequacy of representation. The Federal Rules of Appellate Procedure provide one model for enhanced scrutiny of adequacy of representation in eriminal law. The Rules require federal district courts to appoint counsel for habeas eorpus petitioners when "the interests of justice so require,"[270] and "if necessary for effective discovery," and when "an evidentiary hearing is warranted."[271] Similarly, federal courts provide resources "necessary for adequate representation" to petitioners in cases requiring support services, expert assistance or testimony, statistical analysis, or investigation.[272] Federal courts should thus appoint counsel in aggregate cases involving complex legal and scientific issues affecting groups, which are likely to necessitate evidentiary hearings.

If courts aggregate they may attract better compensated counsel to deal with issues affecting groups, but together with those substantial benefits comes the danger of exacerbating endemic shoddy and under-funded indigent representation.[273] The heightened stakes in criminal cases suggest that due process requires far more careful scrutiny of adequacy of representation in criminal aggregate litigation than in civil aggregate litigation.

3. *Exit Rights*

Although exit rights provide a central protection in civil law against the dangers of being bound by an aggregate judgment without participation or consent,[274] none of the five case studies discussed provided any exit rights. Did each court violate due process?

Nonparty Preclusion, 67 N.Y.U. L. REV. 193 (1992) (reconsidering the theoretical grounding for non-party preclusion, including in aggregate litigation).

269. *See supra* note 124. In its most macabre ruling regarding the adequacy of a class representative, the Supreme Court declined to stay the execution of the lead plaintiff in a class action challenging electrocution as cruel and unusual. After the lead plaintiff's execution, the action was dismissed. *See* Poyner v. Murray, 508 U.S. 931, 932 (1993).

270. 18 U.S.C. § 3006A(a)(2) (2000).

271. Rules Governing § 2254 Cases, Rules 6(a), 8(c).

272. *See* 18 U.S.C. § 3006A(e) (2000); HERTZ & LIEBMAN, *supra* note 60, at § 19.3 (collecting cases regarding financial assistance). Regarding financial assistance in capital cases, see 28 U.S.C. § 848(q)(9) (2000).

273. On the other hand, if a court mercly consolidates cases before a decision makcr who considers cases individually, the parties have a difficult argument that they should receive counsel when they otherwise have no right to counsel. Complexity of cases may sometimes call for discretionary appointment of counsel.

274. *See* George Rutherglen, *Better Late Than Never: Notice And Opt Out At The Settlement Stage Of Class Actions*, 71 N.Y.U. L. REV. 258, 264-67 (1996); *supra* notes 38-39.

In civil law, as noted, the Supreme Court and the Federal Rules require an exit right in "voluntary" class actions, to prevent a party from being adversely precluded without an individual hearing,[275] but Rule 23(b) also permits "mandatory" class actions without such notice and opt-out, for example, when a homogenous class seeks injunctive relief.[276]

One explanation why courts did not provide exit rights in the cases discussed in Part II is that the situations in which they consolidated cases resemble the "mandatory" situations under which Rule 23(b) permits a court to aggregate without notice and an opportunity to opt out. The relief anticipated in several of the cases discussed was often injunctive or declaratory and would, as a practical matter, bind all prisoners in the group. Where decisions regarding common issues did not preclude individual prisoners from later pursuing individual issues in their own cases, there was no need to supply a right to exit.

However, an exit right should be required if a court enters an aggregate criminal law decision that touches on individual issues. Defendants might sometimes be willing to maintain a group action even if it means agreeing to preclude the possibility of a future appeal on a particular issue.

The nature of the day in court provided by the decision-making body conducting aggregation may also alter the due process calculus, and illuminates the need for an exit right even where defendants would not be bound in their individual cases. While courts retain considerable discretion to consolidate and manage their caseloads as they see fit, if a specialized decision maker provides an unduly limited day in court, aggregation may violate due process. For example, if a court groups cases before a non-judge, due process might require an exit right.[277] Similarly, exit may be required if a decision maker aggregated cases without opportunity for a hearing or written decisions in cases deserving them.

Even if courts permit exit, it may have no practical effect. On appeal, a decision as to one case may effectively be a decision as to all as a matter of precedent. Further, criminal defendants may not have adequate counsel to advise them about exit rights. For that reason, adequate representation rights may be a far more critical due process safeguard. I turn now from the procedural dangers of aggregation to several alternatives to aggregation.

---

275. *Id.*

276. *See* FED. R. CIV. P. 23.

277. In civil cases, parties must consent to appointment of a non-Article III special master. *See* FED. R. CIV. P. 53(a), (b). On the other hand, a federal magistrate judge may rule on habeas petitions subject to de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(B) (2000); Rules Governing § 2254 Cases, Rule 8(b)(1), 28 U.S.C.A. foll. § 2254.

B. Models for Institutional Reform

Additional models which rely on institutional reforms—not aggregation—are less encumbered by the due process limitations just described because they do not procedurally aggregate. I have discussed how courts experimented with aggregative innovations to develop systemic remedies for recurring criminal procedure problems. Nevertheless, due process limits the range of situations in which courts can provide aggregate remedies, such as situations in which there is a pattern of criminal procedure rights violations. Rather than impose systemic reform from the outside, another approach would encourage institutional self-reform, perhaps also for systemic problems not rising to the level of constitutional violations. Models for an intermediate approach include innocence commissions, prosecutorial review of wrongful convictions, appointment of a special master to review a district court's habeas corpus petitions, and a two-tiered system of appeal. Such models show the range of techniques that courts could use to not only remedy systemic problems in the administration of criminal justice, but also to collaborate with other repeat player criminal justice actors. Extending systemic approaches beyond procedural aggregation may help to prevent error in the first instance. On the other hand, intermediate institutional models lack advantages of aggregation, particularly a court's grant of formal relief vindicating constitutional rights.

1. Innocence Commissions

One model for institutional reform is for courts to create new independent interdisciplinary institutions resembling administrative agencies. Such agencies would review serious miscarriages of justice, make systemic conclusions and derive possible reforms. In several states, courts or legislatures have created such institutions in response to erroneous convictions uncovered through DNA testing—innocence commissions—tasked with the job of reviewing criminal cases and investigating those that raise indicia of innocence. Other state courts and legislatures are considering establishing such commissions.[278]

One reason states have stepped outside of existing courts of appeals is that courts remain unreceptive to claims of innocence, which face substantial obstacles, such as time limitations, resistance to post-conviction

278. *See* The Innocence Project, Innocence Commissions in the United States, http://www.innocenceproject.org/Content/415.php (describing creation of innocence commissions in the states, including the most recent commission created in Pennsylvania); Editorial, *The True State of C.S.I. Justice*, N.Y. TIMES, Jan. 29, 2007 (noting that half a dozen states are currently considering creating innocence commissions). The Illinois Governor established a temporary commission on capital punishment that presented a series of groundbreaking recommendations subsequently adopted by the legislature. *See* REPORT OF THE GOVERNORS COMMISSION ON CAPITAL PUNISHMENT (2002) [hereinafter REPORT OF THE GOVERNOR'S COMMISSION].

DNA testing, and often the lack of any "writ of innocence" that a petitioner can bring post-conviction.[279] Nor has the Supreme Court defined the burden to present (in a capital case only) a federal constitutional claim of "actual innocence," but the Court did predict it would be an "extraordinarily high" burden due to the disruptive effects such claims would have on "the need for finality in capital cases."[280]

The first such commission, the North Carolina Actual Innocence Commission, established by the North Carolina Supreme Court,[281] was created in the wake of several high profile DNA exonerations.[282] North Carolina's Supreme Court decided that a permanent interdisciplinary study commission was needed, but independent of the judiciary and with interdisciplinary participation of law enforcement, defense attorneys, social scientists and judges.[283] Initially, the Commission developed standards for videotaping police interrogations.[284] It promulgated standards recommending sequential and double blind eyewitness identification procedures,[285] which were adopted

279. *See* REPORT OF THE GOVERNORS COMMISSION, *supra* note 278, at 52; Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Postconviction" DNA Testing Statutes*, 38 CAL. W. L. REV. 355, 356-87 (2002) (reviewing state statutes permitting post-conviction DNA testing and relief, and arguing that most have a series of limitations that restrict relief). Executive clemency also exists to remedy injustices at the discretion of the state executive. *See, e.g.*, Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 282-86 (1998). Such power, however, often has not been exercised by governors even in cases involving DNA evidence of innocence. *See, e.g.*, Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311 (1996) (describing decline in use of commutation, political pressures to avoid clemency, and efforts by legislatures to abolish or limit clemency).

280. Schlup v. Delo, 513 U.S. 298, 314-17 (1995) (stating that a remedy would only exist if the evidence is so strong as to make the sentence "constitutionally intolerable"); Herrera v. Collins, 506 U.S. 390, 417 (1993).

281. *See* Innocence Project, North Carolina Actual Innocence Commission-Mission Statement, Objectives, and Procedures, http://www.innocenceproject.org/docs/NC_Innocence_Commission_Mission.html (setting forth Commission's mission statement and procedures).

282. *See* Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined By a Common Cause*, 52 DRAKE L. REV. 647, 648 (2004) ("Because of the recent number of irrefutable DNA exonerations, a common ground now exists on which law enforcement, prosecution, and defense can stand together and agree that if there are ways to decrease the possibility of a wrongful conviction without risking conviction of the guilty, they should be pursued.").

283. The North Carolina Commission's thirty-one members include "the Chief Justice as chairman, an executive director, the State Attorney General, the Director of the State Bureau of Investigation, the Secretary of Crime Control and Public Safety, an associate supreme court justice, superior court judges, legislative representatives, prosecutors, sheriffs, police chiefs, deputies in law enforcement, defense attorneys, victim advocates, law professors, and private attorneys." *Id.* at 651.

284. *See* Matthew Eisley, *Better ID Sought in Criminal Inquiries*, NEWS & OBSERVER, Sept. 13, 2003, at B1 ("The commission's next task will be to develop standards for videotaping police interrogations.").

285. *See* Innocence Project, North Carolina Actual Innocence Commission, Recommendations For Eyewitness Identification, http://www.innocenceproject.org/docs/NC_Innocence_Commission_Identification.html.

to train all North Carolina law enforcement officers. [286] Thus, the Commission initially took on a primarily policymaking and rule-making role.

Legislation then broadened the Commission to resemble even more an intermediate form of judicial aggregation. A new law created a supplementary North Carolina Innocence Inquiry Commission, with an eight-member panel that reviews criminal post-conviction cases raising indicia of innocence.[287] Panel members serve three-year terms and include a superior court judge, prosecutor, criminal defense lawyer, sheriff, victim's advocate, and members of the public. [288] A Director of the Commission assists in developing rules and standards for cases accepted for review and coordinates investigations.[289] If five panel members agree that a defendant deserves judicial review, the Chief Justice appoints a three judge panel.[290] That three judge panel may then overturn the conviction if they unanimously agree the defendant showed "clear and convincing evidence" of factual innocence.[291] Thus, the state established a novel new interdisciplinary entity to conduct post-conviction review of potential innocence cases.

That inquiry commission model resembles similar bodies created in the United Kingdom and Canada. The United Kingdom, in 1997, created a Criminal Cases Revision Commission to serve as an independent executive agency with full subpoena power to review convictions. It can not reverse convictions, but refers cases to appellate courts.[292] Similarly, in Canada a person can request that the Minister of Justice convene a Criminal Conviction Review Group (made up of attorneys from the Department of Justice) to examine cases and make recommendations to the Minister. The Minister can then order a new trial, hearing, or refer a case to a court.[293]

---

286. See Marvin Zalman, Cautionary Notes on Commission Recommendations: A Public Policy Approach to Wrongful Convictions, 41 No.2 CRIM. LAW. BULL. 5, n.107 (2005).

287. *See* Andrea Weigl, *Easley Signs Law Creating Innocence Panel*, NEWS & OBSERVER, Aug. 4, 2006, at B5; Press Release, Office of the Governor, Gov. Easley Signs Innocence Inquiry Commission Bill (Aug. 3, 2006), http://www.governor.state.nc.us/News_FullStory.asp?is=3226; *see also* H.B. 1323, 2005 Gen. Assem., Reg. Sess. (N.C. 2005); S.B. 1045, 2005 Gen. Assem., Reg. Sess. (N.C. 2005); Mumma, *supra* note 282, at 654. Interestingly, the Commission may not review elaims of factual innocence "if the convicted person is deceased." *See* H.B. 1323 at § 15A-1467(a).

288. *See* H.B. 1323 § 15A-1467(a), 2005 Gen. Assem., Reg. Sess. (N.C. 2005).

289. H.B. 1323 at § 15A-1465.

290. *Id.* at § 15A-1468(c).

291. *Id.* at § 15A-1469(h). The panel's ruling is non-reviewable, but nor does its review "adversely affeet" rights to other post-conviction relief. *Id.* at § 15A-1470(b).

292. See Lissa Griffin, The Correction of Wrongful Convictions: A Comparative Perspective, 16 AM. U. INT'L L. REV. 1241, 1277 (2001); see also David Horan, The Innocenee Commission: An Independent Review Board for Wrongful Convictions, 20 N. ILL. U.L. REV. 91 (2000).

293. Kathryn Campbell, *Policy Responses to Wrongful Convictions in Canada*, 41 No.2 CRIM. LAW BULLETIN 4 (2005).

Purely advisory commissions are perhaps less effective. For example, a new Connecticut Commission on Wrongful Convictions has an advisory role, though it was created with broad, interdisciplinary, bipartisan and high-level participation of state figures such as the Chief State's Attorney, the Bar Association, law schools, law enforcement and legislators.[294]

Independent institutions outside the court system could provide benefits of administrative agencies—expertise, outside perspective, and efficiency. In addition to providing an independent forum to investigate post-conviction, such institutions can engage in systemic review. By gathering information about disposition of criminal cases and appeals, and data regarding the sources of error and unfairness, such Commissions can recommend or implement system-wide reforms.[295] Federal institutions could take on a similar role.[296]

---

294. *See* Advice of Counsel, 8/9/2004 CONN. L. TRIB. 21 ("The membership of the commission is bipartisan and broad, including the Chief State's Attorney, the Chief Public Defender, the Victim Advocate, representatives of the Connecticut Police Chiefs Association, the Bar Association, law schools in the state, and universities in the state with undergraduate programs in criminal justice and forensic science."). Connecticut's advisory commission has investigatory powers, including subpoena power and access to police and prosecutor's records, and it reports to the joint standing committee of the General Assembly on the judiciary suggested reforms to prevent wrongful convictions, conclusions in investigations of convictions or recommendations following investigations as to the causes of a wrongful conviction. 2003 Conn. Pub. Act No. 03-242 § 8. Similarly, a Wisconsin Criminal Justice Study Commission similarly includes diverse government and private individuals gathered to recommend criminal procedure reforms. Wisconsin Criminal Justice Study Commission, Charter Statement, http://www.law.wisc.edu/webshare/02i0/commission_charter_statement.pdf (listing commission participants such as the State Bar of Wisconsin, Marquette University Law School, the Wisconsin Attorney General's Office, and the University of Wisconsin Law School). The California Commission on the Fair Administration of Justice was created by the state Senate in 2004, with members representing leading actors in the state criminal justice system, and it has issued tentative recommendations on eyewitness identifications, false confessions and use of jailhouse informants, which will ultimately be presented to the Governor. *See* http://www.ccfaj.org/charge.html. The Governor of Texas recently created a Criminal Justice Advisory Council, but it currently lacks subpoena power to investigate cases. *See* Press Release, Gov. Perry Announces Creation of Criminal Justice Advisory Council, (Mar. 14, 2005), *available at* http://www.governor.state.tx.us/divisions/prcss/pressreleases/PressRelease.2005-03-14.3742/view.

The Virginia Innocence Commission is an even weaker model. Because it was created as a private policy group and not by government, its recommendations may tend not to be accepted. The Innocence Commission for Virginia (ICVA) has an advisory board that includes "former prosecutors and defense counsel, notable public officials, and members of law enforcement and public interest groups." Innocence Commission for Virginia Homepage, http://www.icva.us. Its first report, "A Vision for Justice," released March 30, 2005, analyzed causes of eleven wrongful convictions in the state and proposes reforms in areas including eyewitness identifications, interrogation, discovery, law enforcement investigation, scientific evidence, and defense practices. *Id.* (follow "The ICVA Report" hyperlink). In the past, however, "reforms recommended by study commissions, which are mainstream, sensible, and bipartisan, seem to be ignored." Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE 98, 104 n.24 (2002).

295. *See* Scheck & Neufeld, *supra* note 294, at 104-05.

296. The Justice For All Act creates a National Forensic Science Commission charged with collecting data on best practices, promulgating standards in forensic testing, and providing research grants. The Act also provides funding for capital defense and for postconviction access to DNA testing. Justice for All Act of 2004, Pub. L. No. 108-405, 118 stat. 2260. The U.S. Justice Department could

Innocence commissions can also accomplish one of the same goals as the courts I discussed which conducted aggregation in criminal law—to pool system-wide information about causes of error and use review of wrongful convictions as an opportunity to consider reform. Despite the power of new information technology, in our balkanized system, many courts lack a systemic picture of issues such as error rates, delays, claims raised on appeal, disposition, costs, sentencing, decisions to prosecute, and jury pools.[297] But use of statistics by the New Jersey and Connecticut Supreme Courts suggests far more sophisticated analysis of error in our criminal justice system. As noted, the DNA revolution has created a rich body of data, which could be used by courts, law enforcement, and also innocence commissions to refine review of criminal convictions, and consider procedures to avoid wrongful convictions.[298] Innocence Commissions reviewing data have already begun to recommend reform in areas implicated by wrongful convictions: double-blind and sequential lineups; videotaping confessions; auditing forensic crime laboratories; and open file policies by prosecutors, all fairly inexpensive and practicable remedies.[299]

"Inquiry" commissions do not use procedural aggregation to join cases together and develop systematic solutions. Instead, without joinder, they attempt to study systemic problems as they review individual cases. They could do so within the courts, using techniques described in Part II, but also by setting up independent commissions to review individual cases and examine errors that cause wrongful convictions. Indeed, specialized institutions could very well be captured, or simply lack the resources or will to address systemic problems that arise. As described, most efforts have been advisory and unsurprisingly ineffectual. If actually invested with resources and power, however, such self-regulation could provide an intermediate way to remedy systemic criminal justice problems.

---

also provide oversight, given its power under 42 U.S.C. § 14141 to obtain relief to eliminate a wide range of police misconduct—any "pattern or practice of conduct by law enforcement officers" that deprives persons of federal rights. 42 U.S.C. §§14141(a) (2000). The Civil Rights Division of the Department of Justice presently investigates excessive force, false arrests, harassment, retaliation and racial profiling, but not wrongful convictions. U.S. Department of Justice, Civil Right Division, Special Litigation Section, Conduct of Law Enforcement Agencies, http://www.usdoj.gov/crt/split/police.htm.

297. For example, despite a rise in Sentencing Information Systems, "[n]o modern structured sentencing system provides easily accessible data describing individual sentences or dynamic sentencing patterns and practices." Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1351 (2005).

298. *See supra* notes 97-108.

299. *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 76-79.

2. Prosecutorial Case Review

Moving away from appellate courts and court-created review commissions to self-regulation by other actors in the criminal system could further expand the focus on systemic remedies, though also without the accountability that courts provide when they aggregate cases. Self-regulation by prosecutors could have a great impact, because they may be the most powerful repeat players in the criminal system; the ability of reform to reduce error and shape the system in the future depends intimately on the role of prosecutors. In a second type of intermediate approach, prosecutors could conduct internal review of cases to try to detect and remedy systemic problems.

Prosecutors already group unrelated cases using a "de facto administrative system" in which, based on the nature of resource allocation, criminal law and sentencing guidelines, prosecutors in effect set sentences during plea bargaining.[300] The process that most criminal defendants receive is not constitutional procedure, but rather internal review of discretion within prosecutorial agencies. Prosecutors could inform that process by conducting routine audits and review following miscarriages such as wrongful convictions. Such a role does not aggregate, and therefore does not impose a systemic remedy binding in all cases, but rather uses informal techniques to examine groups of troubling cases.

The roles of prosecutors continue to change in response to error, and expanding the model, prosecutors could develop procedures to prevent errors before they happen. In several recent examples, prosecutors adopted an institutional interest in preventing egregious error in the criminal justice system. Prosecutors spearheaded a series of reforms adopted in Boston in response to several high profile exonerations, including reform of eyewitness identification procedures.[301] In one high profile example, prosecutors led efforts to review and sought dismissal of almost one hundred convictions in the Ramparts Division police corruption scandal in Los Angeles.[302] Prosecutors were intimately involved in the West Virginia consolidation and North Carolina innocence project discussed.

Though informal, such efforts could evolve into formal administrative review by prosecutors geared toward preventing error. In turn such errors detected could lead to adoption of open-file policies or change in criminal

300. Lynch, *supra* note 72, at 2142.

301. Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 87-88.

302. *See, e.g.*, Beth Barrett & Greg Gittrich, *Attorneys Confront D.A.; Flurries Of Defense Motions Fly In Attempt To Open Files On Rogue Cop*, DAILY NEWS, Mar. 20, 2000 (noting that Superior Court Judge Larry Fidley dismissed sixty convictions at the request of the District Attorney's office based on an investigation carried out by its task force); Rick Orlov, *Truth of 234 More Cases in Question*, DAILY NEWS, May 5, 2000 (describing District Attorney's task force review of which convictions should be dismissed).

investigation procedures.[303] The result could parallel the work of innocence commissions in continually evaluating causes of error and developing procedural remedies. I note also that law enforcement and public defenders could similarly adopt procedures designed to detect systemic problems and suggest remedies.[304]

Again, the benefit of procedural aggregation by courts remains that courts formally remedy patterns of constitutional violations, enjoining all actors with a judgment binding on an entire group of cases. Relying on more informal self-regulation without any mechanism to ensure accountability may not always provide as effective relief, even where actors are willing to self-regulate. Nevertheless, should self-regulation be adopted more widely, actors could prevent patterns of error from ever occurring in the first place and avoiding the need for more intrusive procedural aggregation by courts.

3. *Judge Weinstein's Special Master*

Federal district court Judge Jack B. Weinstein appointed a special master to handle federal habeas corpus petitions, but unlike courts discussed in Part II, he did not procedurally aggregate. Instead, he adopted self-regulation by a court. He assigned habeas corpus petitions to a single decision maker who considered each petition individually, avoiding procedural difficulties of aggregation, while achieving some of the same benefits.

At the suggestion of Judge Weinstein, the Eastern District of New York applied to its backlog of almost five hundred habeas corpus petitions, including petitions that had been awaiting disposition for six years, the same aggregative and consolidating techniques that Judge Weinstein pioneered in civil procedure.[305] To resolve that backlog in a "fair and expeditious" manner, Marc Falkoff was appointed Habeas Corpus Special Master for the Eastern District of New York from 2003-2004.[306]

Never before had federal courts consolidated habeas corpus petitions before a special master. The approach intended to achieve many of the efficiencies of a class action but without formal joinder of claims. Martha Minow describes Judge Weinstein's class action innovations as creation in effect of "temporary administrative agencies."[307] Judge Weinstein's special

303. *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 75, 87-88.

304. I have elsewhere described how in response to wrongful convictions, police departments have adopted new procedures aimed at reducing errors in the areas of forensic science, eyewitness identifications and confessions. *See supra* note 107.

305. See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997).

306. *In re* Habeas Corpus Cases, 298 F. Supp. 2d 303, 317 (E.D.N.Y. 2003).

307. *See* Minow, *supra* note 305, at 2010.

master project suggests creation of such "temporary administrative agencies" post-conviction.

The consolidated disposition of the petitions remained transparent; Special Master Falkoff reported to Judge Weinstein, who ruled on each,[308] and periodically then reported to the chief judge of the District.[309] All cases except three dozen that were reported were resolved through unpublished written decisions.[310] Judge Weinstein also reported on the data set from the consolidated review: in nine cases, 2% of petitions, the writ was granted with release or a new trial ordered; 380 were dismissed as lacking in sufficient merit, forty-two as time-barred, three as successive, and forty-four were closed for failure to exhaust or as unripe.[311]

The reasons cited for this novel approach are illuminating. Judge Weinstein emphasized reduced delays to the petitioner and also a concern with adequate representation, stating, "[s]ince there is no constitutional requirement for representation by counsel in post-appeal state or federal collateral attacks, it is the poor who find themselves unable to find counsel to help expedite decision, and it is the poor who are most disadvantaged by our court's delays."[312] Judge Weinstein also noted delay costs imposed on the state system, and comity, especially due to exhaustion requirements of the AEDPA.[313] Weinstein's reasoning reflects those justifying aggregation in civil class actions: efficiency, avoiding delay and enhanced representation. A prominent reason was judicial economy, given a "heavily overloaded court."[314]

Judge Weinstein's innovations, while not aggregating petitions, but rather still considering each one individually, nevertheless point to a range of techniques that could revolutionize the way habeas corpus petitions are reviewed.[315] While Judge Weinstein's approach sought primarily to achieve judicial economies, one could imagine a court taking the next step to

---

308. In the first six weeks, seventy-three cases "were disposed of," with a petition granted in one case. *See* Cerisse Anderson, *Murder Conviction Overturned on Jury Charge*, N.Y. L.J., Sept. 22, 2004.

309. *See In re Habeas Corpus Cases*, 298 F. Supp. 2d at 304.

310. *Id.*

311. *Id.* at 307. Judge Weinstein noted that a "substantial number" of cases deserved careful review, and "were quite close but were denied due to the highly deferential standards of review imposed by statute and case law." *Id.*

312. *Id.* a 312.

313. *Id.*

314. *Id.* at 304.

315. Connecticut may adopt such a model systemwide along the lines of Judge Weinstein's innovations. Its Law Reform Commission has proposed a sweeping reform in which all state habeas petitions would be consolidated in one judicial district, with expedited procedures to sort cases and assign counsel before they are filed. *See* DAVID L. HEMOND, CONNECTICUT LAW REVIEW COMMISSION, COMMITTEE REPORT ON HABEAS CORPUS (2001), http://www.cga.ct.gov/lrc/Habeas%20Corpus/HabeasRptToCommission.htm. Interestingly both the State Attorney General's Office and Public Defenders Office approved the proposal. *Id.* The reforms have not been enacted to date.

aggregate petitions and decide common substantive or procedural issues in order to detect and remedy systemic errors. Or rather than aggregate, a court could merely assign cases before a particular judge or magistrate or special master, who nevertheless could screen and sort habeas petitions based on common issues or perceived merit. This would achieve some of the economies and benefits of aggregation while maintaining an individualized approach to each case.[316] Such a model leads toward a two-tiered model discussed next.

4. Two-Tiered Criminal Review

Decades ago, Judge Henry Friendly posed the deep and also inflammatory question: "[i]s innocence irrelevant" to our system of post-conviction review?[317] Why are petitioners not able to make the claim on appeal that they are actually innocent—and taking it a step further, should petitioners be required to assert a "colorable claim of innocence"?[318] As a moderated version of Judge Friendly's proposal, Joseph Hoffman and William Stuntz (before the AEDPA) proposed a "two-tracked" system,[319] in which "petitioners who can demonstrate a reasonable probability of innocence would receive de novo review of their federal claims."[320] Neither Congress nor courts have adopted such invitations.[321]

Nevertheless, courts could institute something like an innocence commission: permitting "first tier" review of substantive claims based on predictable causes of wrongful convictions, while relegating other cases to the same "second tier" review they now receive. Courts could group together cases by issue and assign cases raising a reasonable indicia of innocence to a special master. Moreover, without changing the U.S. Code, the courts could simply exercise their inherent authority to consolidate cases, just as Judge Weinstein and state supreme courts did.

Courts conducting such appellate review could look for common issues that could be aggregated, and provide a forum for procedural

316. *In re Habeas Corpus Cases*, 298 F. Supp. 2d at 317. Judge Weinstein did not recommend future "specialization in habeas cases by any one magistrate judge," but instead that a randomly selected half of petitions be consolidated before a "specific magistrate." *Id.* Judge Weinstein also proposed milder reforms: procedures for the Clerk's office to expedite and conduct centralized assembly of files, an initial screening by a "paraprofessional," and a series of expedited internal deadlines. *Id.* at 313-17.

317. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970).

318. *Id.*

319. *See* Hoffmann & Stuntz, *supra* note 61, at 65, 69; *see also* Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 430 (1990-1991).

320. Hoffmann & Stuntz, *supra* note 61, at 69.

321. Congress has not formalized innocence-based review, though it has also not enacted proposed habeas legislation which far from creating an innocence "fast track," would make assertion of innocence prohibitively difficult. *See* Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005).

aggregation and remedies along the lines of the approaches discussed in Part II. Patterns of error that would otherwise go untreated, as in the Tenth Circuit, could instead be referred to an innocence special master, who would arrange for consolidated counsel. Similar to the Louisiana court, the court could bifurcate and target issues, and not resolve difficult individual questions of harmless error and disposition of claims. Courts or petitioners could then assemble issues-only proceedings to remedy particular problems, such as prosecutorial misconduct, faulty eyewitness identification procedures, pattern of shoddy forensic evidence, and *Brady* violations.[322] They could also simply group cases raising common problems before specialized decision makers.

Such new centers for appellate review could then continually collect data on the causes of wrongful convictions that they identify.[323] Rather than rubber stamp habeas corpus petitions as likely frivolous, judges could use aggregation to focus on substantive issues. State courts might be better able to do this, since they are not constrained by the AEDPA; proposals in Illinois and Massachusetts, for example, permit greater substantive review in capital cases.[324] Consolidating appeals might allow courts to identify patterns of error and to more efficiently correct and educate deviating lower courts.[325] Appellate courts could also assess patterns of error within prosecutor's offices or police departments.

Such review furthers the underlying purposes of habeas corpus, which the Supreme Court states is "at its core, an equitable remedy" in which courts may make exceptions to procedural rules in "extraordinary cases" for "truly deserving" petitioners who would otherwise face a "miscarriage of justice" based on actual innocence.[326] Yet courts can not easily assess

---

322. Data from state courts and innocence commissions could be shared with a judge or special master, who could then develop expertise in technical and scientific issues involved in assessing innocence; for example, understanding forensic evidence, eyewitness identification issues, and coerced confessions. Such data could lead eventually to a change in the procedures by which courts handle petitions and a move toward a second tier of substantive review for cases raising indicia of innocence.

323. Courts could "[r]equire the official collection and reporting of data on cases where newly discovered evidence of innocence is the basis for overturning a conviction." *See* JIM DWYER, PETER NEUFELD, BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 290 (2000).

324. See Joseph L. Hoffmann, *Protecting The Innocent: The Massachusetts Governor's Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561, 563-72 (2005); Stephen L. Richards, *Reasonable Doubt Redux: The Return of Substantive Criminal Appellate Review in Illinois*, 34 J. MARSHALL L. REV. 495 (2001).

325. Courts could identify geographic patterns; error rates vary greatly among counties within states. For example, James Liebman's landmark study of capital sentencing uncovered that higher proportions of reversals came from counties with the highest percentage of capital sentencing. *See* James S. Liebman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences In The United States*, J.E.L.S. 209-261 (2004), http://www.stat.columbia.edu/~gelman/phd.students/death.pdf.

326. Schlup v. Delo, 513 U.S. 298, 319 (1995) (citing cases); Hensley v. Municipal Court, 411 U.S. 345, 350 (1973) ("'The very nature of the writ demands that it be administered with the initiative

whether there has been a "miscarriage," and remain divided on how to interpret the burden for showing "actual innocence" either as a "gateway" to excuse a procedural default or as a freestanding claim.[327]

One way to develop what such a burden would entail would be to create a setting in which district courts could gather information and compare "actual innocence" claims. A common law of innocence could emerge.[328] A concern then arises as to appellants who are unable to obtain relief in trial courts and relegated to second tier justice in appellate courts. Courts might neglect procedural rights asserted by those who lack DNA evidence or other means to make a colorable claim of innocence in a system more focused on special cases of the innocent and neglecting criminal procedure rights presented in many other cases.[329] Given the rise of aggregation through class actions, multi-district litigation, and consolidation, Judith Resnik suggests that "federal courts have become less willing to attend to small cases and to individual problems."[330] The same could occur as to criminal procedure rights. As noted, courts have already sounded alarms in response to unpublished summary dismissals by judges seeking to clear dockets.[331] The quality of decision making could suffer under an aggregate regime, prejudicing appellants if they lack an exit right or counsel.[332]

Then again, federal judges already summarily or sua sponte dismiss almost all habeas petitions.[333] The Court has long stated that one purpose of

---

and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected.'"); Harris v. Nelson, 394 U.S. 286, 294, 299 (1969) (courts may fashion "appropriate mode[s] of procedure" to efficiently resolve habeas proceedings).

327. Herrera v. Collins, 506 U.S. 390, 417 (1993) (majority of the Court holding that a "persuasive" demonstration of actual innoeence would render unconstitutional a capital conviction); *Schlup*, 513 U.S. at 312 (stating that a showing of "innocence" to excuse default requires a petitioner to show "more likely than not that 'no reasonable juror' would have convicted him"); *see also* Petition for a Writ of Certiorari, House v. Bell, 2005 WL 1527632 *17-28 (2005) (citing circuit splits regarding the *Schlup* test, regarding to what degree new evidence must undermine the old, application of the "reasonable juror" standard, and whether a showing of actual innocence is required).

328. *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 111-14 (describing how civil wrongful conviction suits could similarly redefine content of criminal procedure rights given a refined understanding of causes of error).

329. If few cases raise indieia of innocence, that would be noteworthy, and would mean scant judicial resources would be drawn from second tier cases.

330. Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2220 (1989).

331. *See generally* 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2573, at 487-88 (1995) ("many courts of appeals have held that the district courts [in ruling on habeas petitions] must either make findings or otherwise give their reasons for their action").

332. As in civil class actions, courts may generalize law to reach common issues but in doing so defeat individual rights. *See* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 n. 73 (1998).

333. *See* ROGER A. HANSON & HENRY W.K. DALEY, FEDERAL HABEAS CORPUS 17 (1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf (finding 63% of petitions were denied summarily); *see also* Rules Governing § 2254 Cases, Rule 4, 28 U.S.C.A. foll § 2254. Judges may already in practice assume most criminal appeals are frivolous, but examine claims raising indicia of innocence. *See* Anna-Rose Mathieson & Samuel R. Gross, *Review for Error*, 2 LAW, PROB. & RISK 259, 265

habeas corpus is to provide "procedures designed to discourage baseless claims and to keep the system open for valid ones."[334] Current habeas law does not effectively perform this sifting function. As Justice Jackson admonished, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones."[335] Judge Friendly added that while Justice Jackson's "thought may be distasteful [] no judge can honestly deny it is real."[336] Focusing on relief only for the "colorably innocent" perhaps is less controversial now that the innocent have their convictions upheld, while violations of criminal procedural rights are declared harmless, defaulted or unexhausted.[337] The Court and then the AEDPA have already shifted federal habeas corpus toward abbreviated review of error.[338] Explicitly adopting a two-tier system of review could merely make the current reality transparent and permit more careful review of the cases with greater merit. Therefore, an intermediate approach that is able to identify patterns of error might then encourage courts to adopt procedural aggregation to remedy systemic problems detected.

C. *Aggregation, Institutional Reform, and Criminal Procedure Rights*

If courts continue to examine systemic problems and remedy them by aggregating criminal cases and appeals, they may assume a Chayesian institutional reform or structural reform role, but by aggregating cases themselves from within the criminal system.[339] Just as civil class actions arose as "an evolutionary response to the existence of injuries not remedied by the regulatory action of the government," perhaps courts will use aggregation as a form of judicial self-help, to directly enjoin institutions responsible for harms that only arise piecemeal in our current system.[340]

In that sense, the aggregation I have described in criminal law sheds light back on civil aggregation and its unique problems. Aggregation in criminal law does not involve economic recoveries, and therefore avoids the dangers of self-interested attorneys. Unlike in civil class actions (except

---

(2003) ("in ordinary criminal cases appellate courts might tacitly assume that most defendants are guilty, focus their attention primarily on the rare cases in which they think a defendant might be innocent, and paper over procedural errors in the rest.").

334. McCleskey v. Zant, 499 U.S. 467, 493 (1991).

335. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

336. Friendly, *supra* note 317, at 149.

337. Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at Parts II-III.

338. Federal legislation proposed in 2005 would if enacted have made habeas corpus even more summary and "streamlined." Proposed federal legislation to "streamline" habeas corpus would make the process even more summary. *See* Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005).

339. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

340. Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980).

23(b)(2) actions), criminal courts focus on injunctive institutional reform. Aggregation in criminal law is driven not by private actors, but is centered in courts, themselves seeking to detect, monitor, and remedy, in which they play a central role.

Court centered aggregation may also provide a more effective institutional reform remedy for police abuses, inadequate counsel, and prosecutorial misconduct than civil rights litigation did even in its heyday.[341] While civil rights litigation brought ancillary to criminal litigation once commonly sought to remedy patterns and practices of police abuse or prosecutorial misconduct, as noted, such civil actions now face substantial doctrinal roadblocks and rarely result in direct relief.[342] For example, a civil rights lawsuit seeking to structurally reform a state crime laboratory would likely run aground on doctrines of standing, comity, and deference to state law enforcement.[343] However, the West Virginia Supreme Court was able to institute top to bottom reform of its state crime laboratory. These aggregative experiments show that courts can order procedural reforms to prevent miscarriages from happening in the first place, rather than simply respond to error after the fact.

This type of aggregation also calls into question our current constitutional criminal procedure. Appellate review is severely constricted where the Supreme Court conceives of constitutional remedies for criminal procedure violations as individual, permitting relief only if the violation was a harmful error that sufficiently prejudiced the outcome at trial.[344] While criminal procedure rights ostensibly serve deterrence goals of criminal procedure,[345] decades of harmless error jurisprudence and procedural bars mean that courts rarely grant the reversals that might

---

341. On the decline of the Chayesian public law ideal and possibilities for its revitalization, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

342. Regarding failure of civil class action suits regarding inadequate indigent defense, *see* Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808 (2000); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); *see also* Adele Bernhard, *Justice Still Fails: A Review Of Recent Efforts To Compensate Individuals Who Have Been Unjustly Convicted And Later Exonerated*, 52 DRAKE L. REV. 703 (2004); Garrett, *Remedying Racial Profiling*, *supra* note 87. (describing a litany of obstacles faced by class actions seeking relief against discriminatory law enforcement). However, I have described elsewhere possible transformative effects of individual civil wrongful conviction suits seeking damages (and sometimes resulting in injunctive settlements). *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19. For accounts of how public law litigation accomplishes successes outside the traditional litigation model, *see* Sabel & Simon, *supra* note 341; Garrett, *Remedying Racial Profiling*, *supra*.

343. *See* Garrett, *Standing While Black*, *supra* note 89. For a federal court dismissing as non-justiciable a civil challenge to inadequate indigent representation, see *supra* note 194.

344. *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 99-100.

345. The Supreme Court ruled that trial courts must exclude evidence obtained in violation of constitutional rights not as a "personal constitutional right," but rather to protect the public by deterring official misconduct. *See* Stone v. Powell, 428 U.S. 465, 495 n.37 (1976).

affect law enforcement and prosecutors in practice.[346] A striking example discussed above was the forensic fraud by Joyce Gilchrist, who was found by several Oklahoma criminal courts to have engaged in misconduct. But the courts did nothing more to impose discipline or audits because in each individual case the misconduct was ruled harmless error. It was not until years later, after fraud in hundreds of cases surfaced and at the urging of the Governor, that the system finally confronted what had by then become a mass harm.[347] Thus, if courts acknowledge that criminal procedure rights can reveal systemic issues, they can bolster the deterrent power of constitutional criminal procedure rights.

With the deterrent effect of both criminal appeals and civil rights litigation undermined, aggregation in criminal law necessitates a turn toward protecting substantive rights of defendants. Taking Louisiana's treatment of ineffective assistance of counsel as an example, the provision of inadequate counsel concerns not just one convict's rights, but implicates the indigent defense funding system of the municipality. Yet appellate courts typically take cases as they see them, on an individual basis and ask whether the performance of counsel in one case was prejudicial at trial. In such instances courts rarely grant relief, and thus fail to reach policy or baseline funding issues.[348] By separating out and aggregating the group problem of ineffective assistance, courts can examine a systemic problem affecting all indigent defendants. This would allow courts to refrain from focusing on individual questions of prejudice that typically render claims prohibitively difficult to prevail upon in practice.

Moving beyond such aggregative models, the intermediate institutional reform models that I discuss—including innocence commissions, prosecutorial review, use of special masters, and two-track review—may also restructure the criminal system to better detect, remedy, and prevent errors. In addition to criminal courts, powerful repeat players such as prosecutor's offices or law enforcement can ensure compliance with constitutional norms. Nevertheless, such self-regulation may not always be reliable, and when persistent patterns of constitutional error arise as in the past, courts can both enforce remedies for violations and deter future violations.

Finally, courts and other actors could apply aggregation to not only the problems remedied by the courts in the five case studies discussed, but to the full range of criminal procedure rights that defendants may assert, such as chronic under-funding of indigent defense, repeat prosecutorial misconduct, malfeasance in forensic laboratories, or patterns of concealing

346. *See* Garrett, *Federal Wrongful Conviction Law*, *supra* note 19, at 99-100.

347. *See supra* note 152 and accompanying text.

348. For criticism of the failure of courts to "enforce minimum levels of funding for public defenders' offices," *see* Stuntz, *Uneasy Relationship*, *supra* note 62, at 70.

exculpatory evidence. When viewed in the aggregate each set of problems may resemble mass torts or mass injuries to criminal defendants. A mass remedy is only appropriate. Criminal justice institutions have rarely asked or answered such systemic questions, but if they do, they can redefine the substance of our constitutional criminal procedure.

CONCLUSION

The divide erected by the Supreme Court between civil and criminal law leaves substantial leeway for courts to aggregate in criminal cases. The Court focused its due process rights and rules on the criminal trial. As a result, while courts may not aggregate in regards to elements of a crime that must be proved beyond a reasonable doubt at trial, aggregation regarding affirmative criminal procedure rights of defendants remains viable and highly desirable. Constrained by formalism, the criminal system may fail to adequately remedy grave miscarriages such as wrongful convictions, or endemic problems like inadequate representation or official misconduct.

The Supreme Court's emphasis on a formal individualized day in court has ironically pushed lower courts to adopt aggregation as judicial self-help. Lower courts now aggregate as a creative and pragmatic alternative to a thicket of procedure that consumes vast resources that could be better spent addressing pressing problems of substance. If the issue reaches the Supreme Court, it should embrace, not undermine, this previously unexplored grassroots expansion of the boundaries of criminal adjudication.

While the contours of aggregation in criminal law remain untested and unexplored, I propose a roadmap to guide courts in this foreign terrain. My functional due process approach requires attention to due process safeguards regarding preclusion, exit, and adequate representation. This framework both structures aggregation in criminal law and erects protections against the dangers of mass criminal justice. After all, aggregation remains double-edged. Courts must vigilantly review these innovative mechanisms to ensure against en masse sacrifice of criminal procedure rights of the accused and magnification of already endemic inadequate indigent representation. Nevertheless, the five case studies presented indicate how aggregation regarding specific criminal procedure rights permits remedies for systemic problems that can only benefit criminal defendants and appellants.

Finally, I suggest that a second wave of innovation could restructure the criminal system by adopting intermediate forms of aggregation by courts and other criminal justice actors. Such institutional reform innovations include innocence commissions, prosecutorial review, special masters, and "two-tier" review of cases raising indicia of innocence. Such

institutional approaches create opportunities for actors at all levels to address systemic problems rather than examining criminal convictions individually, while also avoiding the procedural risks of aggregation. Intermediate models may reinvigorate substantive institutional reform and substantive solutions in our currently overly-proceduralized and individualized criminal system. At the same time, when informal self-regulation by criminal justice actors does not sufficiently prevent recurring constitutional violations, as may often occur depending on how effective such programs are, court-centered aggregation may still provide a crucial remedy and a deterrent to enforce compliance.

Judge Gerard E. Lynch writes that "[n]ovel legal and bureaucratic structures typically appear when older ones fail."[349] Aggregation could transform criminal adjudication by permitting litigation of the criminal procedure rights of groups of people. Courts have quite understandably been hesitant to adopt such novel procedures, except occasionally after egregious systemic failures. That reluctance may be due to an individualized concept of criminal procedure, a lack of a perceived need, or an unwillingness to interject courts into difficult and intrusive long-term projects addressing systemic issues. Shedding light on the promise of aggregation allows a reconsideration of our individualized adjudication of criminal procedure rights. The five case studies illustrate how courts can appropriately use aggregative techniques to effectively address a range of pervasive criminal procedure problems. Aggregation provides courts with more efficient means to uncover and remedy systemic violations of constitutional rights, craft structural reforms for institutions, secure higher quality legal representation and expert assistance, and achieve greater equality. If courts further embrace its potential, aggregation promises significant improvement in the efficiency, accuracy, fairness and integrity of our criminal justice system.

349. Lynch, *supra* note 72, at 2142.